

REPORTS AND CASES OF LAW:

Argued and adjudged in the COURTS of LAW,
WESTMINSTER.

In the time of the late

QUEEN ELIZABETH,

From the 18th. to the 33th. year of her Raign.

Collected by a Learned Professor of the LAW,
WILLIAM LEONARD, Esq; Then of the
Honourable Society of GRAYS-INNE.

Published by *Will. Hughes of Grays-Inne, Esq;*

*With Alphabetical Tables of the Names of the Cases, and of the Matters contained
in the BOOK.*

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yard, 1658.*



THE POKER

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OF

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Written and published in the City of PAW^s

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Honorable son of CRAZY-LINE

Brought by PAW^s Help of CRAZY-LINE Ed^r

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in the City of PAW^s Ed^r from of CRAZY-LINE

TO THE R E A D E R.

Courteous Reader,

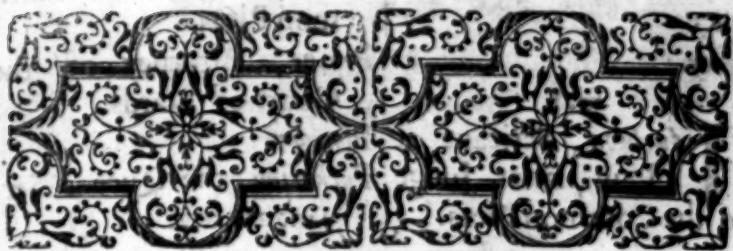
THese Cases were Collected and taken in the French Tongue, by *William Leonard Esquire*, sometimes of the Honourable Society of *Grays-Inne*; a Learned Professor and Practiser of the Common Law, in the time of the Raigne of the late Queen *Elizabeth*: One Copy of some of these Cases (many years past) came into the hands of Sir *Robert Hitcham Knight*, afterwards Serjeant at Lavy; Another Copy of other of these Cases came then into the hands of *Humphrey Davenport Serjeant at Law*; afterwards Sir *Humphrey Davenport Knight*, late Lord chief Baron of the Court of *Exchequer*; Both which sayd learned persons approved of them, and made use of them in the course of their severall Practice. Some other Copies of some of these Cases are now dispersed abroad, and are in the hands of divers Practisers and Students of the Lavy, vwho make the like use of them. The Originals themselves of all these Cases (amongst many others of the said Mr. *Leonard*: collecting) all of them under his own hand-writing, are now in my hands, having been delivered to me by a vworthy Gent. of the sayd Society of *Grays-Inne*, vwho had them out of the Library, sometimes belonging to the sayd Mr. *Leonard*. These Cases having been lately, truly and carefully Translated by me out of the Original French Copy into English, have since the Translation thereof, been peruled and approved of by many Eminent Professors of the Lavy. Wherefore I finding that the same do contain many excellent Matters and Points of Lavy, vwhich have not heretofore been Printed, or published, do here offer the same unto thy Judgment upon a serious consideration, hoping they may be of some use and benefit to thee, in the like course of thy study and practice of L A W.

*From my Study at Grays Inne,
Novemb. 20^b. 1658.*

Will. Hughes.

TO THE
READER.

The Clerks were Collég'de the Law in the French
Towns by the King of France himself, government of
the Honourable Society of Gentlemen, a certain
Professor and Lawyer of the Common Law, in the
name of the Royal Society of the Queen Elizabeth : One Copy of
some of these Books of the Royal Society (many where being) came into the hands of
Sir Robert Dudley (now Earl of Warwick) who presented it to the
Liberal Society of the Queen's College Cambridge into the hands of
Dr. John Keswicke, then Master of the Royal Society of the Queen's College Cambridge, Sir Edmund
Gardiner Kynaston, Vice Lord High Admiral of the Queen of England, and
John, Bishop of Hereford, by several portions of his power, and
thereupon presented it to the Society of the Queen's College. Some
other Copies of these Books of the Royal Society were delivered abroad
by the Queen's Agent to divers Prelates and Students of the
University of Oxford, and likewise to divers Prelates and Students of the
University of Cambridge (now called Trinity College). The Queen of England
gave one of these Books to the Society of the Queen's College Cambridge, and
the Queen of Scotland to the Society of the Queen's College, and
the Queen of Ireland to the Society of the Queen's College Dublin. The Queen of France
gave one of these Books to the Society of the Queen's College Paris, and
the Queen of Spain to the Society of the Queen's College Madrid. The Queen of
Portugal to the Society of the Queen's College Lisbon. The Queen of
Denmark to the Society of the Queen's College Copenhagen. The Queen of
Norway to the Society of the Queen's College Oslo. The Queen of
Sweden to the Society of the Queen's College Stockholm. The Queen of
Prussia to the Society of the Queen's College Berlin. The Queen of
Austria to the Society of the Queen's College Vienna. The Queen of
Hungary to the Society of the Queen's College Budapest. The Queen of
Sardinia to the Society of the Queen's College Turin. The Queen of
Naples to the Society of the Queen's College Naples. The Queen of
Bavaria to the Society of the Queen's College Munich. The Queen of
Württemberg to the Society of the Queen's College Stuttgart. The Queen of
Hanover to the Society of the Queen's College Hanover. The Queen of
Prussia to the Society of the Queen's College Berlin. The Queen of
Denmark to the Society of the Queen's College Copenhagen. The Queen of
Norway to the Society of the Queen's College Oslo. The Queen of
Sweden to the Society of the Queen's College Stockholm. The Queen of
Hungary to the Society of the Queen's College Budapest. The Queen of
Sardinia to the Society of the Queen's College Turin. The Queen of
Naples to the Society of the Queen's College Naples. The Queen of
Bavaria to the Society of the Queen's College Munich. The Queen of
Württemberg to the Society of the Queen's College Stuttgart. The Queen of
Hanover to the Society of the Queen's College Hanover.



The Names of the Learned Lawyers, Serjeants at Law, and Judges of the severall Courts at Westminster, who argued the Cases, and were Judges of the severall Courts, where the Cases were argued.

viz.

A

Anderson, Lord Chief Justice of the Common Pleas.

Anger.

Altham, afterwards one of the Barons of the Exchequer.

Atkinson.

Ayliffe, Justice of the Kings Bench.

B.

Beaumont, Serjeant at law, afterwards Judge of the Common Pleas.

Bromley, Lord Chancellor of England.

Barkley.

C.

Cook, after Lord Chief Justice of the Common Pleas.

Clench, one of the Judges of the Kings Bench

Cooper, Serjeant at Law.

Clark, Baron of the Exchequer.

D.

Daniel, Serjeant at Law, after Judge of the Common Pleas.

Drew, Serjeant at Law.

Dyer, Lord Chief Justice of the Common Pleas.

E.

Egerton, Sollicitor of the Queen, after Lord Chancellor.

F.

Fleetwood, Serjeant at Law, Recorder of London.

Fuller.

Fennor, Serjeant at Law, after Judge of the Kings Bench.

G.

Gawdy, Judge of the Kings Bench.

Golding, Serjeant at Law.

Glanvile, Serjeant at Law, after Judge of the Common Pleas

A Gent

A Table of the Lawyers Names.

Gent, Baron of the Exchequer.

Godfrey.

H.

Haughton, Serjeant at Law, after Judge of the Common Pleas.

Hammon, Serjeant at Law.

Harris, Serjeant at Law.

Heale, Serjeant at Law.

Hobart.

K.

Kingsmill, Judge of the Kings Bench.

L.

Laiton.

M.

Mead, Serjeant at Law, after Judge of the Common Pleas.

Morgan.

Manwood, Lord Chief Baron of the Exchequer.

Mounson, Iustice of the common Pleas.

O.

Owen, Serjeant at Law, after Baron of the Exchequer.

P.

Popham, Attorney General of the Queen, after Lord Chief Iustice of

B.R.

Periam, Judge of the Common Pleas.

Pepper, Attorney of the Court of Wards.

Plowden.

Puckering, the Queens Serjeant at Law.

R.

Rodes.

Rudge of the Common Pleas.

S.

SNag, Serjeant at Law.

Shuit, Judge of the Kings Bench.

Shuttleworth, Serjeant at Law.

T.

Tanfield, Serjeant at law, after Lord Chief Baron of the Exchequer.

Topham.

W.

VV^{Ray}, Lord chief Iustice of the Kings Bench.

Windham, Judge of the Common Pleas.

Walnesley, Scrjeant at Law, after Judge of the Common Pleas.

Y.

Yelverton, Serjeant at Law, after Judge of the Kings Bench.

The

The Names of the Cafes.

Note { 1. P. stands for Principall Cafe
 { 2. B stand for a Vouched Cafe.

A.	Sect.	
Llington and Bails Case.	34 P.	Basset and Kerns Cafe 92 p
Albany and Bishop of Saint Assaphs Case,	39 p	Bret and Auders Cafe 95 p
Aspool, and Inhabitants of Evering- ham's Case	72 p	Brook and Kings Cafe 99 p
Arden and Gents Case	75 b	Baldwin and Cocks Case, 101 p
Arundel and Morris Case	98 p	Bret and Shepherds Case 114 p
Allen and Palmers Case	133 p	Baxter and Bales Case 115 p
Atkinson and Rolfs Case	141 p	Butler and Ayres Case 118 p
Atkins and Hales Case	192 p	Bushies Case 122 b
Askew and Earl of Lincolns Case	196 p	Birds Case 125 b
Asbegell and Dennis Case	272 p	Branchers Case 139 p
Arundell, and Bishop of Gloucesters Case	278 p	Bear and Underwoods Case, 142 p
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Austin and Smiths Case	441 p	Bronker and Robertbams Case 162 b
Lord Abergavennies Case	469 p	Brook and Doughties Case 173 p
Anonnimus, 2 p 8 p 15 p 17 p 38 p 40 p 45 p 61 p 73 b 75 p 81 p 83 p 86 p 94 p 104 p 108 p 109 p 116 p 132 p 145 p 150 b 157 b 173 b 220 p 221 p 222 p 224 b 226 p 266 p 285 p 290 p 296 p 308 p 335 p 349 250 351 352 353 354 355 356 357 358 359 360 361 365 371 386 390 392 393 396 397 400 401 408 418 443 444 451.	Bilsford and Foxes case 189 p	
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Bonefant and Sir Richard Greenfields Case	78 p	Bradstocks case 288 p
Beverleys and Cornwallis Case	84 p	Bagshaw, and Earl of Shrewsburies case 292 p
Bracebridge & Baskerviles Case	87 p	Bishop and Harcourts case 295 p
Barker and Pigots Case	89 p	Byne and Playns case 303 p
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		Bownsell and Tylers case 314 p
		Beal and Tailors case 320 p
		Blunt and VVhitacres case 327 p
		Bishop of Lincolns and Cowpers Cafe 336 p
		Bennet and Frenches case 339 b
		Bracebridges case 355 p
		Bishop and Redmans case 375 p
		Baskerville and Bishop of Herefords case 379 p
		Beddingfield, and Bedingfelds case 385 p
		Burgesse and Fosters case 395 p
		Barret and Kings case 412 b
		Bighton and Sawls case 428 b
		Bond and Richardsons case 432 p
		Beares case 440 p
		Beal and Carters case 462 p
		Bond and Bails case 464 p
		Burchers

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C. 2018 C. 10		Dene and Williots case	243 p
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Sir Julius Caesars case	144 p	Dormers case	132 p
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Chapman and Hursts case	208 p	Erbery and Lattons case	270 p
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Cusfts and Ouldmans case	282 p	Flood and Sir John Perrots case	35 p
Citton's case	297 p	Fallwood and Fullwoods case	74 p
Cheney and Smiths case	298 p	Fordleys case	88 p
Lord Cobham and Browns case	299 p	Ferrors case	146 p
Chamberlains case	302 p	Foster and Thorns case	173 b
Cook and Huets case	317 b	Sir George Farmer and Brook's case	199 p
Cleypools case	369 p	Fox and Collins case	205 b
Carriston and Godburies case	372 p	Fisher and Boys case	228 b
Caries case	380 p	Fish and Browns case	253 p
Cole and Friendships case	391 p	Fenwick and Misfords case	256 p
Crisp and Goldings case	405 p	Fester and Pisalls case	347 p
Collet and Andrewes case	417 b	Ferrand and Ramseis case	362 p
Carter and Cleycocks case	427 p	Flemings case	403 p
Corbets case	434 p	Fabian and Windors case	425 p
Crossman and Readis case	448 p	Frend and Battis case	450 p
Cole and Walls case	463 p	Foster and Wilsons case	458 p
Conny and Barbams case	444 p	G.	
Crew and Bayles case	465 p	Gilbert and Sir George Harts case	5 p
Lord Cromwell and All Souls case	467 b	Gray and Jetts case	63 p
Corbet and Cleers case	467 b	Gamock and Clifffes case	78 p
D.		Gill and Harewolds case	80 p
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Dellabay and Hassalls case	167 p	Sir Thomas Greshams case	113 p
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Sir Ed. Dyers case	203 b	Gage and Paxtins case	158 p

A Table of the Cafes.

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<i>Sir Henry Goodiers cafe</i>	185 p	<i>Hudson and Leights cafe</i>	447 p
<i>Gesslin and VVarburtons cafe</i>	187 p	<i>Hoskins and Stapers cafe</i>	468 p
<i>Gibbs cafe</i>	225 p		I.
<i>The Guild of Bostons cafe</i>	228 b	<i>Sir Henry Isleys cafe</i>	102 b
<i>Galliard and Archers cafe</i>	267 p	<i>Sterome and Neales cafe</i>	143 p
<i>Greenwood and VVeldens cafe</i>	294 p	<i>Jerome and Knights cafe</i>	146 p
<i>Green and Edwards cafe</i>	300 p	<i>Jennings and Winches cafe</i>	214 p
<i>Gawton and Lord Dacres cafe</i>	301 p	<i>Ivory and Frys cafe</i>	216 p
<i>Gore and Dawbneys cafe</i>	316 b	<i>Islays cafe</i> 264 p <i>James cafe</i>	264 b
<i>Greenliff and Bakers cafe</i>	317 p	<i>Jones cafe</i>	281 p
<i>Green and Pendletons cafe</i>	318 b	<i>Jennings and Gowers cafe</i>	318 p
<i>Guilfords cafe</i>	322 p	<i>Jeofry and Coites cafe</i>	329 p
<i>Gallery and Bunburries cafe</i>	328 b	<i>Johnson and Bellamies cafe</i>	330 b
<i>Geofries and Coites cafe</i>	329 b	<i>Jennor and Hardeys cafe</i>	383 p
<i>Greens cafe</i>	348 p		K.
<i>Gibbs and Rowleyes cafe</i>	367 p	<i>Kempe and Hollingborns cafe</i>	25 p
<i>Gerrard and Sherringtons cafe</i>	388 p	<i>Kimpton and Bellamies cafe</i>	56 p
<i>Gravenor and Massyys cafe</i>	398 p	<i>Knights cafe</i>	37 p
<i>Glanvill and Mallaries cafe</i>	421 p	<i>Kinters cafe</i>	59 p
<i>Gillam and Lovelaces cafe</i>	435 p	<i>Kempe and Carters cafe</i>	70 p
<i>Greeves cafe</i>	436 p	<i>Keys and Stedds cafe</i>	105 p
<i>Green and Hundred of Bucklechurches cafe</i>	456 p	<i>Kight and Footmans cafe</i>	124 p
		<i>Kinnerly and Smarts cafe</i>	206 p
		<i>Kirkster and Leversages cafe</i>	209 p
		<i>Kimpton and Dawbennets cafe</i>	227 p
H.		<i>Knight and Savages cafe</i>	260 p
<i>Addons cafe</i>	10 b	<i>Kirby and Eccles cafe</i>	261 p
<i>Harvy and Heruyes cafe</i>	26 p	<i>Kenfum and Redings cafe</i>	334 p
<i>Hungerfords cafe</i>	36 p	<i>Kellet and Kellerts cafe</i>	355 b
<i>Higham and Harewoods cafe</i>	42 p	<i>Kempson and Coopers cafe</i>	437 p
<i>Henly and Broads cafe</i>	53 p	<i>Knightly and Spencors cafe</i>	467 p
<i>Hudson and Leights cafe</i>	65 p		L.
<i>Heydons cafe</i>	96 p	<i>Endell and Pinfolds cafe</i>	24 p
<i>Hawkes and Molineux cafe</i>	100 p	<i>Lodge and Luddingtons cafe</i>	26 b
<i>Hamington and Rydears cafe</i>	120 p	<i>Lassels cafe</i>	28 b
<i>Howell and Trivanians cafe</i>	121 p	<i>Lepus and VVrothes cafe</i>	44 p
<i>Hudsons cafe</i>	821 b	<i>Lewknor and Fords cafe</i>	62 p
<i>Higams and Reynolds cafe</i>	123 p	<i>Leights and Hammers cafe</i>	67 p
<i>Haithsome and Harvies cafe</i>	166 p	<i>Livesseys cafe</i>	106 p
<i>Hosking and Jones cafe</i>	177 b	<i>Littletons and Perus cafe</i>	186 p
<i>Hunt and Gilborns cafe</i>	182 p	<i>Lee and Maddox cafe</i>	235 p
<i>Hedd and Challengers cafe</i>	204 p	<i>L. Lumley and Fords cafe</i>	263 b
<i>Heyses and Allens cafe</i>	210 p	<i>Long and Hemmings cafe</i>	289 p
<i>Hawkings and Lawses cafe</i>	214 p	<i>Lancasters cafe</i>	291 p
<i>Hulson and Webbs cafe</i>	229 p	<i>Linacres cafe</i>	313 p
<i>Hambleden and Hambledens cafe</i>	230 p	<i>Lancaster and Lucas cafe</i>	316 p
<i>Hauxwood and Hnsbands cafe</i>	249 p	<i>Lacies cafe</i>	363 p
<i>Home and Connys cafe</i>	254 p	<i>Lodges cafe</i>	376 p
<i>Holland and Franklyns cafe</i>	257 p	<i>Leers cafe</i>	387 p
<i>Hill and Hills cafe</i>	321 p	<i>Lee and Curetons cafe</i>	412 p
<i>Hill and Lockbams cafe</i>	331 b	<i>Lacy and Fishers cafe</i>	413 p
<i>Harvy and Thomas cafe</i>	332 p	<i>Loves cafe</i>	421 b
<i>Hartopps cafe</i>	342 p	<i>Lemons cafe</i>	427 b
<i>Hemmingsham & Windhams cafe</i>	346 p	<i>L Leigh and Okeleys cafe</i>	438 p
<i>Hales cafe</i>	374 b		<i>Moore</i>
<i>Huddy and Fishers cafe</i>	377 p		
<i>Hollingsbed and Kings cafe</i>	384 p		

A Table of the Cafes.

M.			
M oore and Farrands cafe	6 p	Pendleton and Gunstons cafe	60 p
Manies cafe	7 p	Potter and Steddals cafe	66 p
Marquess of VVinchesters cafe	18 b	Parson of Facknams cafe	67 p
Marsh and Smits cafe	33 p	Prowse and Caries cafe	131 p
Mollineax cafe	39 b	Pearl and Edwards cafe	134 p
Marquess of Northamptons cafe	44 b	Pawlet and Lawrence's cafe	138 p
Mascals cafe	82 p	Peirce and Leversuches cafe	163 p
Moile and Earl of VVorwicks cafe	85 p	Page and Jordans cafe	165 p
Martin and Stedds cafe	111 p	Piers and Foes cafe	171 p
Mounson and VVebs cafe	112 p	Pierce and Howes cafe	179 p
Mitchell and Hides cafe	119 p	Pelmer and Smalebrooks cafe	180 p
Lord Mountfores cafe	157 b	Povost of Queens Colledge cafe	183 p
Musket and Coles cafe	168 p	Park and Moses cafe	200 p
Mibb and Friends cafe	178 b	Pexhals cafe	156 b
Mounson and VVebs cafe	181 p	Palmer and Thorps cafe	239 p
Lady Mallories cafe	189 b	Palmer and Knowles cafe	247 p
Mallet and Ferrers cafe	191 p	Petty and Trivilians cafe	276 p
Marsh and Astreys cafe	203 p	Page's cafe	284 p
Marriot and Pascalls cafe	228 p	Pelmes and Bishop of Peterboronghs cafe	
Miford and Hoppers cafe	241 p		312 p
Matthew and Hassals cafe	245 p	Pet and Basdens cafe	318 p
Mills and Snowbells cafe	287 p	Page and Fawcets cafe	318 p
Matbeson and Trotts cafe	393 p	Pendleton and Haw's cafe	175 b
Martingale and Andrews cafe	319 p	Pawley and Siuers cafe	370 p
L. Mordent and Vaux cafe	330 b	Penryddock and Newmans cafe	378 p
Mordants cafe	207 b	Perry and Allins cafe	420 p
Manning and Andrews cafe	345 p	Pett and Callys cafe	422 p
Mausier and Anneleys cafe	374 b	Piggot and Harringtons cafe	445 p
Mayor of Lynns cafe	404 p	Q.	
Maidwell and Andrews cafe	429 p	Queen and Lord Vaux cafe	49 p
Mashes cafe	433 p	Queen and the Bishop of London's cafe	
Mitchell and Hares cafe	452 p		50 p
Mashes cafe	459 p	Queen and Middletons cafe	58 p
Marbery and VVorrels cafe	466 b	Queen and Lewes and Greens cafe	162 p
N.		Queen and the Bishop of Canterbury's cafe	
L ord Norris and Braybrooks cafe	28 b		190 p
Nash and Edwards cafe	155 p	Queen and Buckberds cafe	207 p
Nash and Mollins cafe	325 p	Queen and the Bishop of Canterbury, and	
Norwood and Dennis cafe	455 p	Fanes cafe	280 p
O.		Queen and the Bishop of York's cafe <td>307 p</td>	307 p
O ldefeld and VVilmers cafe	194 p	Queen and Braybrooks cafe	364 p
Osbon and Kirtons cafe	258 b	Queen and the Dean of Christchurch cafe	
Offley and Sattingtons cafe	321 p		399 p
Ognell and Underwoods cafe	339 b	R.	
Ognell and Sheriffs of London	374 p	R eareby and Rearebyses cafe	16 p
Oglethorp and Hydes cafe	470 p	Richards and Berllets cafe	23 p
P.		Rumney and Eves cafe	128 p
L ord Paget and Sir VValter Asbtions cafe	4 p	Rivet and Rivetts cafe	159 p
Lord Paget and the Bishop of Coventries cafe	9 p	Read and Nashes cafe	205 p
Punsany and Leader's cafe	14 p	Read and Johnsons cafe	217
Parmart and Griffins cafe	47 p	Rockwood and Rockwoods cafe	275 p
Partridge and Partridges cafe	48 p	Rigden and Palmers cafe	277 p
		Russell and Prattis cafe	278 p
		Randall and Browns cafe	339 b
		Russell	

A Table of the Cases.

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Rotchefters case	380 b	Sborn and Sborrs case	389 p	
Rofton and Chambers case	382 p	Sortheotes case	393 b	
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Rawlins case	416 p	Stile and Millers case	411 p	
Rider and Cobbams Case	447	Scobell and Cavells case	446 p	
S.				
Toneley and Bracebridges case	10 p	Stevensons case	457 p	
Sutton and Dousies case	13 p	Sovars case	461 p	
Smith and Peazes case	21 p	Sutton and Danfes case	467 b	
Statia and Carters case	30 p	T.		
Lord Sturtions case	33 b	Reffams case	11 p	
Searches case	93 p	Tringe and Lewes case	20 p	
Smith and Kirfoots case	97 p	Taylor and Moores case	41 p	
Savell and Woods case	122 p	Troublefeild and Troublefields case	46 d	
Sulhard and Everrets case	126 p	Tacker and Elmers case	90 p	
Stebbs and Goodlacks case	127 p	Toff and Tompkins case	172 p	
Saint John and Petrits case	129 p	Tempeft and Mallets case	246 p	
Staffords case	151 p	Thetford and Thetfords case	274 p	
Samsford and Wards case	152 p	Thetford and Thetfords case	283 p	
Stamp and Hutchins case	153 p	Tillocks and Holts case	323 p	
Stone and VVitbypolls case	156 p	Trupenies case	330 p	
Smith and Smiths case	159 b	Thomus and Wards case	331 p	
Stretton and Taylors case	161 p	Tedcastell and Halliwell's case	344 p	
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R E P O R T S



REPORTS and CASES OF LAW;

Argued and adjudged in the time of Queen *Elizabeth*, from
the twenty fourth to the three and thirtieth year of her
Reign.

Hil. 25. Eliz. in the Kings Bench.

I. *Borneford and Packingtons Case.*

In Trespass, It was found by special verdict, That the Defendant was seised of the Mannor of B, whereof the place where is parcel, demised and demiseable by Copy, &c. And that B the Grandfather of the Plaintiff was seised of the place when, &c. according to the custom of the said Mannor, in Fee simple, and that within the said Mannor there is this Custom, That if any Copy-holder dyeth seised, his wife over-living him shall hold all the Land during her widowhood as Free-bench, and shall be admitted Tenant to the Lord, and that the Heir shall not be admitted to it during the life of his Mother: And found also another Custom within the said Mannor, That if any Copy-holder be convicted of Felony, & the same be presented by the Homage, that then the Lord might seize, &c. And it was further found, that the Grandfather of the Plaintiff took a Wife, and dyed seised, having issue A, Father of the Plaintiff. The Wife is admitted to her Free-bench, A is convicted of Felony, and that is presented by the Homage; and afterwards A dyed, after which the Wife dyed, &c. It was argued by Atkinson, that this A is not within the danger of this Custom, for during the life of his Mother, who by the Custom is Tenant to the Lord, and admitted to it, she is Copy-holder, and it is not like to the Case lately adjudged of *possessio fratris*, without admittance, for there the party was admittable, and so he was not here: And also it appeareth by the Custom as it is found, That the Lord upon such matter shall seize, and therefore we ought to make construction that this Custome do not extend to Cases where the Lord cannot seize; but in the Case at Barre, the Lord cannot seize by reason of this Free-bench; And we ought not by any construction extend a Custom beyond the words in which it is conceived, but it shall be taken strictly, and not be supplied by Equity with a Custom in the place of a Seizure. But notwithstanding all this, afterwards Judgment was given against the Plaintiff.

II Hill. 25. Eſt. in the Kings Bench.

ACOPY-holder doth surrenderto thy use of one A upon trust, that he shall hold the said Land until he hath levyed certain monies, and that afterwards he shall surrender to the use of B; the moneys are levyed, A is required to make surrender to the use of B, he refuseth, B exhibits a Bill to the Lord of the Manors against the said A, who upon hearing of the Cause decrees against A, that he sh. ll surrender; he refuseth, now the Lord may seize, and admit B to the Copy-hold, for he in such Cases is Chancelloz in his own Court, per totam Curiam.

Hill. 25. Eſt. in the Kings Bench.

III. Wade and Bemboes Cſe.

IN a Writ of Error by Wade against Bembo upon a Judgment given in the Court of the City of Bristol, the Case was, That Bembo was Plaintiff in the said Court against Wade in an Action of Covenant, and declared of a Covenant made by word by the Testator of Wade with Bembo; and declared also, that within the said City there is a Custom, That Conventio ore tenus facta, shall bind the Covenanter as strongly as if it were made by writing: And it was holden by the Court, that that Custom doth not warrant this Action, for the Covenant binds by the Custom the Covenanter, but doth not extend to his Executors, and a Custom shall be taken strictly, and therefore the Judgment was reversed.

25 Paſch. 25. Eſt. in the Kings Bench,

IV. The Lord Paget and Sir Walter Ashton's Case.

THE Lord Paget brought an Action of Trespass against Sir Walter Ashton, who justified because he is seized of three Messuages to him and his Heirs, and that he and all those whose estate he hath, &c. have had the Wood-warship of the Forrest of C, within which, the place where, &c. and also have had within the said Forrest Estates without number: And that one Rowland Bishop of Coventry and Leichfield was seized of the Forrest aforesaid in the right of his Church, and by Indenture betwixt him and Sir Edw. Ashton his Ancestor, whose Heir he is, letting sooth that divers debates had been betwixt the said parties concerning some profits within the said Forrest: It was agreed betwixt them, that the said Sir Ed. Ashton should release unto the said Rowland all his right in the said Office and Estates, and that the said Rowland should grant de novo unto the said Edw. and his Heires the said Office, and one hundred loads of Estates per annum out of the said Forrest: After which the said Ed. according to the said agreement, did release to the said Bishop, ut supra, after which the said Bishop by Indenture reciting the said former Covenants in compl. Indenture predict. Convent. did grant to the said Sir Ed. the said Office and Estates pro ea siamento dicti Edwardi, & hæred. suorum by assignment of the Officers of the said Forrest; if the assignment be not made within ten days after request, that then the said Ed. and his Heires should cut down wood where they pleased; and averred, the things released were of as great value as the things granted: And upon this matter the Plaintiff did demurre in Law, and it was adjudged for the Plaintiff, for here no Inheritance in the things granted passed to the said Sir Edward, but only an Interest for his own life; for the grant was to Sir Ed. only without the wood, Heires, and the reference to the Indentures, by which the Bishop hath covenanted to grant the Inheritance, nor the words in the grant imply an estate in Fee, s. pro easimento dict. Ed. & hæred. suorum, and that in default

default of Assignment it should be lawful for Sir Ed. and his Heirs, shall not supply the defect of the words in the grant.

Mich. 25. and 26. Eliz. in the Kings Bench.

2. Gilbert and Sir George Harts Case.

Gilbert brought Debt upon Escape against Sir George Hart Sheriff of Kent and declared, That he recovered a certain debt against A, who was taken in Execution, &c. And the Case was, That the said A was taken in Execution in the time of the old Sheriff, and escaped also then: and afterwards the Defendant being Sheriff, the Plaintiff again sued a Scire facias against the said A up on the Judgment aforesaid, upon which Execution was awarded by default, and thereupon issued a Capias ad satisfaciendum, by which A was taken, and escaped: And by the opinion of all the Justices, the Defendant in this Case shall be charged, for notwithstanding that A was once in Execution, which was determined by escape in the time of the old Sheriff, yet when Execution was now awarded against him upon his default in the Scire facias, the same shall bind the Sheriff out of whose custody he escaped.

M b. 25, and 26. Eliz. in the Common Pleas.

6. Moor and Farrands Case.

Moor leased Lands to Farrand upon condition that he, his Executors or Assignes should not alien without the leave of the lessor; Farrand died in testate, his Wife took Letters of Administration, and aliened without leave, and by Periam Justice, she is not within the penalty of the Condition, for the Administrator is not merely in by the party, but by the Deputy: And by Meade and Periam, If a Lease for years upon such a Condition be extended upon a Recognisance, the same is not an alienation against the Condition: But some lessee for years upon such Condition taketh a Husband and dyeth, the Husband is within the danger of the Condition, for he is Assignee: If the King grant to a Subject bona & cattala felonam, and the lessor for years upon such a Condition be outlawed, upon which the Patentee enters, Now by Periam the Patentee is not bound by the Condition, Meade contrary, for the Condition shall go with the Land.

Mich. 25, and 26. Eliz. in the Exchequer.

7. Maynes Case.

Mayne seised of Lands in Fee, took a Wife, made a Feoffment to a Stranger, committeth Treason, and thereof is attainted, and hath a Charter of Pardon and dyeth. It was moved by Plowden in the Exchequer, if the Wife of Mayne shall have Dowry against the Feoffee? Manwood Chief Baron, by Dowry, treason of this Attainted Dowry cannot accrue to the Wife, for her title begins by the Enter-marriage, and ought to continue and be consummated by the death of the Husband, which cannot be in this Case; for the Attainted of the Husband hath interrupted it, as in the Case of Cloppement: And this Attainted is an nisi Attainted Eschoppe, and doth not run in privity only betwixt the Wife and him to whom the Escheat belongs, but every stranger may barre her of her Dowry by reason thereof; for by the Attainted of the Husband the Wife is disabled to demand Dowry as well as to demand his Inheritance, and he cited the Resolution of all the Justices of England in the Case of the Lady Gates, 4. Ma. Dyer, 140. and the Pardon doth not help the matter, for the same extends but to the

life of the Offender, but doth not take away the Attainder by which he is barred to demand Dower during the said Attainder in force: See the Statute of 5. E 6. cap. 11. Vid. Fitz. Dower 82. 13. E 3. 8. E 3. Dower 106. Fitz. Ul leg. 49.

8. Mich. 25, and 26. Eliz. in the Exchequer.

In the Exchequer it was found by special verdict. That the Guardians and Chanvons Regular of Ptery, were seised of the Manors of O, &c. and that 22. H. 7. at a Court holden there, granted the Lands in question to W and W his Son for their lives by Copy, according to the Custom of the said Manors, and that afterwards 30. H. 8. They leased the said Lands by Indenture to H, rendering the ancient and accustomed Rent, and afterwards surrendered their Colledge, &c. and afterwards W and W dyed: And if that Lease so made during the customary estate for life, notwithstanding the Statute of 31. H. 8. be good or not, was the Question, being within a year before the surrender, &c. It was argued by Egerton Solicitor, that the said Lease is void by the Statute; the words of which are (whereof or in the which any estate or interest for term of life, year, or years, at the time of the making of any such Lease, had his being or continuall ant was not then determined, finished, or expired) and therefore we are to see, if that right or possession which W had at the time of the making of the Lease, were an interest, or an estate for life: And as to this word (estate) it is nothing else then measure of time, for an estate in Fee simple is as much as to say, an interest in the Lands for ever, and the like of other estates. and therefore here W and W had at the time of the making of this Lease an estate for life in the thing demised: And although such customary Tenants are termed in Law Tenants at will, yet they are not simply so, nor merely Tenants at will, but only Tenants at will, secundum Consuetudinem Manerii, which Customs warrant his possession here for his life, and therefore it is a more certain estate then an estate at will, for the Copyholder may justifie against his Lord, so cannot a Tenant at will, whose estate is determined at the will and pleasure of his Lessor: And although this estate is but by Custom, and by no Conveyance the estate is raised; it is as material, so as it be an estate: and this estate being supported by Custom is known in Law an estate, and so accounted in Law; and the Law hath notably distinguished Copy-hold, Tenancies by Custom, and Tenancies at will by the Common Law; for a Copy-holder shall do Fealty, shall have aid of his Lord in an Action of Trespass, shall have and maintain an Action of Trespass against his Lord, his wife shall be indowred, the Husband shall be Tenant by the Curtesie without new admittance: and it was adjudged in the Common Pleas, 8. Eliz. That if a Copy-holder surrender to the use of another for years, the Lessee dyeth, his Executor shall have the residue of the Term without any admittance: M. 14. and 15. Eliz. a Copy-holder made a Lease for years by Indenture warranted by the Custom, it was adjudged that the Lessee should maintain Ejectione firm, althoough it was objected, that if it were so, then if the Plaintiff doth recover, he should have Habere facias possessionem; and then Copy-holds should be ordered by the Laws of the Land, 10. Eliz. Lord and Copy-holder for life, the Lord grants a Rent-charge out of the Manors, whereof the Copy-holder is parcel, the Copy-holder surrenders to the use of A who is admitted accordingly, he shall not hold it charged, but if the Copy-holder dyeth, so that his estate is determined, and the Lord granteth to a stranger de novo to hold the said Lands by Copy, this new Tenant shall hold the Land charged: and so was it rated and adjudged in the Common Pleas. It was adjourned.

Leases for
three lives of
Copy-hold
estate are not
within Stat.
31. Eliz.

Copy holders
Interest.

Mich. 25. & 26 Eliz. in the Kings Bench.

9. The Lord *Page*, and the Bishop of *Coventry* and *Leichfelds*
Case.

Thy E. Bishop of Coventry and Leichfeld was endicted of Trespass in the County of Stafford, of breaking and entring of the Close of Thomas *Lord Page*, called the Vineyard, the Bishop traversed the Endictment, and at the day of appearance of the Jury, the Bishop challenged the Array, because that he being a Peer of Parliament, no Knight was returned, &c. Upon which challenge the Queens Counsel did denunt in Law, but at last, for expedition, &c. the Court delivered to the Counsell of the Bishop, a Bill sealed to save him the advantage of the said challenge: And the request was taken, de bene esse, who found, that one A by the Commandant of the Bishop entred into the said Close called the Vine-yard, being then in the occupation of one B at will, of the said Lord Page, and did the Trespass: viz. digged a Turf there, and there left it, and so departed. The matter of challenge was many times argued, and it was argued against the said challenge, because that the King is party, against whom no Lord of Parliament shall have such Prerogative, to which it was answerd on the other side, that so much the rather, the challenge lyeth in the Case, for where a Peer of the Parliament is to be tryed upon an Endictment of Treason or Felony, it shall be per pares, if upon appeal of Murder, or Felony by ordinary tryall, see 32. H. 8. Br. *Coyall* 42. and Br. *Enquest*, 49. It was said on the other side, that here the Bishop is quodam modo, and the Venire facias issued at his own suite, and therefore the mismaking of the Pannell is his own fault; But by Gawdy Justice, the Venire facias in this Case is reputed in Law, the Suite of the Queen, notwithstanding that the party endicted for his expedition, doth pay the Fees for the Processe, for that, the Clerks of the Court have encroached for their gaine, for otherwise there shold be none paid by the Queen; and by the better opinion of the Court, the challenge was holden good: Another matter was moved, because the Endictment is (clausum Domini *Page*) and it appeareth by the Verdit, that the said close at the time of the Trespass was in the occupation of B, at the will of the Lord *Page*: for the Lord *Page* cannot have an Action of Trespass against the said Bishop, or the said A upon the matter, & by Wray, the Lord *Page* cannot have Trespass. Quare clausum fregit & intravit upon this matter; but for digging upon the Land, demised, or cutting of Trees, an Action lyeth, 19. H. 6. to Trespass, 36. But here the Endictment is, that one P entred by the commandment of the Bishop, upon which matter no Action lyeth against the Bishop, by the Lord *Page*, and especially in this case where the said A did not carry away the said Turf from thence, but by Wray, notwithstanding that the Action of Trespass doth not lie for the Lessor, yet it is well enough by way of Endictment: Another exception was taken to the Endictment, because it is alleagued, that A by commandment of the Bishop entred, and did the Trespass, and no place is shewed where the commandment was, and for this cause, the Bishop was discharged.

Mich. twenty five, and twenty six Eliz. in the Kings Bench.

10. *Stoneley, and Bracebridges Case.*

In Ejectione firmæ, by Stoneley against Bracebridge, the case was, Thomas Bracebridge Father of the Defendant was seised of the Mannor of Kingsbury, to him and to the heires males of his body, and 32. H. 8. Leased a Feild called Stalling, parcell of the said Mannor, to Tho. Coke for years, and afterwards, 4. H. 6. Leased the said Feild (the first Lease being in esse) to Sir Geo. Griffith for seventy

seventy years, who assigned the same to A Bracebridge Brother of the Lessor, and to Joyce Wife of the Lessor, and afterwards, s. E 6. The said Tho. Bracebridge, the Lessor, by his Deed Indented, gave the said Manors to the said Sir George by these words (dedi concessi, barganizavi, & vendidi) Proviso, and upon condition, That the said Sir George, should pay to the said Thomas Bracebridge, within fifteen dayes after ten hundred pounds, and if he faile of payment thereof, that then after the said fifteen dayes, the said Sir George should be seised of a Tenement, parcell of the said Manors of the yearly value of three pounds (now of late in the occupation of Thomas Smith) to the use of the said Thomas Bracebridge for his life, and after to the said Sir George, untill he had levied five hundred pounds for the payment of the debts, and the education of the children of the said Thomas Bracebridge, and after to the use of the Defendant in tail: And of the residue of the said Manors, to the use of the said Tho. Bracebridge, and of the said Joyce his Wife for their lives, &c. Tho. Bracebridge, made livery to the said Sir George, in one place parcell of the said Manors, which was in his own occupation in the name of the whole Manors: the fifteen dayes incur without payment of the said ten hundred pounds, the Indenture is enrolled: Coke attornies, Joyce dyes, Tho. Bracebridge grants the Lands to a stranger by Office, and before Proclamations, Thomas his Son and Heire apparent, within age, enters, in the name of the Feoffees by reason of the forfeiture, Proclamations are made, Tho. Bracebridge the Father dyeth, the Termes of Coke expireth, A enters, and leaseth to the Plaintiff who enters, upon whom Tho. Bracebridge the Son enters, upon which Entry the Action is brought, it was forged by Beaumont the elder: Although here in the Indenture of bargain & sale, there is not an expresse consideration set down in the common forme of a consideration, yet because the consideration is implied in the condition, it is good enough (see the Proviso and condition, ut supra, that the said Sir George should pay, &c.) As if I bargaine and sell to you my Land, Proviso that you pay to me for the same at such a day one hundred pounds, that consideration set doone in the forme of a condition is as effectuall, as if it had been formally expressed in the usuall Termes, as to the second payment: Where a man bargaines and sells his Lands by Deed indented to be enrolled, and before enrollment he makes Livery to the Bargainer, and afterwards the Indenture is enrolled, the Court discharged Beaumont from the arguing of that payment, for by Wray, the Livery doth prevent the operation of the Enrolment, and Sir George shall be accounted in by the Livery, and not by the bargaine and sale, for Livery is the more worth, and more worthy ceremony to passe estates, and thereforee shall be preferred: and then the Livery being made in such part of the Manors, which was in the possession of the Feoffor in the name of the whole Manors, no more of the Manors passeth but that which was then in the possession of the Feoffor: And the Reversion of such part of the Manors which was in Lease shall not passe without Attornement, but when the Enrolment cometh, now the whole passeth, and then the Reversion being settled by the Enrolment, the Attornement coming afterwards hath no relation: See 48. E. 3. 15, 16. The Jury here have found the default of payment, thereby the conditionall use which passed by the bargaine and sale, upon the condition broken, shall be reduced to the Bargainer without any Entry, & then the uses limited after are void, for in use limited upon an use cannot rise, quod fuit concessum per totam curiam, then Bracebridge the Father, having the Inheritance of the said Manors in his own right, and the interest de futuro, for yeares in the right of his Wife jointly with the said A, when he sells the said Manors by Deed indented and enrolled, now thereby the interest for yeares which he hath in the Right of his Wife doth not passe, for a bargaine and sale is not so strong a conveyance as a Livery. As if I have a Rent charge in the right of my Wife, out of the Manors of D, which Manors afterwards I purchase, and afterwards by Deed indented and enrolled, I bargaine and sell the said Manors, &c. the Rent shall not passe.

Livery, where
it prevents o-
peration of
an Enrol-
ment.

passee. Then the said Thomas Bracebridge the Father having the said Right of an entaile to him and the Heires Hales of his body, and being Tenant for life, by his own conveyance, the Remainder in tail to his Son and Heire apparent, the new Defendant, when he levyeth a Fine, and the Son enters for forfeiture before Proclamations passe, and his Father dyeth, in that case the Defendant is not remitted unto the first entail, although after Proclamations passe in the life of the Father, and so he shall not avoid the Leases; for notwithstanding that the Issue in tail by that Entry hath defeated the possession which passed by the Fine, yet as to the right of the old entail, the Fine doth retaine its force, and so he entred, quodam modo, in assurance of the Fine: As if Tenant in tail doth discontinue and disseiseth the Discontinuor, and levyeth a Fine with Proclamations, and the Discontinuor enters within the five years, now although the Fine as to the Discontinuor be avoided, so as the possession which passed by the Fine is defeated, yet the right of the entail doth continue bound: Egerton Hollicoz contrary: and he conceived, that all the Manors doth passe by the Livery to Sir George, and nothing of it by the Enrolment, and that the meaning of the parties was, that all shoulde passe by the Livery, for if the assurance shoulde enure by the bargaine & sale, then the secondary uses limited upon default of payment, shoulde never rise, for an use upon an use cannot rise, & then the said uses limited for the payment of the debts of the Fecoz, &c. shoulde be defeated, & also where at the begining of the assurance, the condition was entire, the warranty entire, &c. & if such construction shoulde be allowed, here shalbe a divided condition, a divided warranty: And also the meaning of the parties that the whole Manors shoulde passe, by such construction shoulde be dismembred, and part passe by the Livery, and part by the bargaine and sale, and we ought to make such constructions of Deeds, that things may passe by them according to the meanings of the parties, as if I be seised of a Manor to which an Advowson is appendent, and I make a Deed of Feasement of the same Maner, cum pertinencij, and deliver the Deed to the party, but no Livery of seisin is had, the Advowson shal not passe, for then it shoulde be in grosse, whereas the meaning of the parties was, that it shoulde passe as appendant, and that in such case cannot be, for there is no Livery, therefore it shal not passe at all, and so it hath been adjudged: So if I bargaine and sell my Manor of D, and all the Trees in the same, and I deliver the Deed, but it is not enrolled, the Trees shal not passe, for the intent of the parties was, that the Trees shoulde passe, as parcel of the Free-hold and not as Chattels. And as to the remitter, I conceive, that the Heire entring as Heire, by the Law is remitted, but where the Entry is given by a speciall Statute, there the Entry shal not enure further then the words of the Statute; As Land is given to the Husband and Wife, and to the Heires of the body of the Husband, the Husband levyeth a Fine and dyeth, the wife entreth, this Entry shal not availe to the issue in tail, for the Entry is given to the Wife by a speciall Law: And he cited Sir Richard Haddons Case, the Husband aliened the Lands of his Wife, they are divorced, the Husband dyeth, the Wife shal not enter by 32. H. 8. but is put to her Verit of Cui invita ante divor. And afterwards the same Termes the Justices having considered of the Case, delivered their opinions upon the matters by Wray cheif Justice, viz. That the one moeity of the Lease was extint by the Livery, viz. the moeity of Joyce the Wife of the Lessor, and as to the other moeity it is in being, for here is no remitter, for if any remitter had been in the Case, it shoulde be after the use raised, which is not as yet raised, for the Land ought to remaine in Sir George untill the said five hundred pounds be levied, and that is not found by the Verdict, and therefore for the said moeity, the Plaintiff had Judgement.

Mich. 25, and 26. Eliz. in the Exchequer.

X I. Treshams Case.

SI R John Tresham seised of the Mannor of D holden of the King in Capite By Knights service, 4. H 7. enfeoffed Edmund Earl of Wilts and N Vaux Knight, who gave the said Mannor to the said Sir John in tayle, upon condition that he should not alien, &c. quo minus, &c. John Tresham dyed seised, by whose decease the Mannor descended to Tho Tresham, who entred, and 18. H 8. aliened with licence, by recovery, &c. N. Vaux the surviving Feoffee dyed, having issue W Lord Vaux; the purchasor dyed seised, his Son and Heir 14. Eliz. leyyed a Fine Sur Conusans de droit, &c. and that Fine was leyyed to the us of the Conusee, &c. and that without licence: The Lord Vaux within five yeares after the Fine leyyed, entred for the condition broken: and now issued forth a Scire facias against the Conusee for that alienation without licence, who made default, whereupon issued processe to seize the Lands; whereupon came Sir Tho. Tresham, and shewed the whole matter aforesaid, and prayed to be discharged.

Fine for Allie-
nation with-
out Licence.

It was said, that this Prerogative to have a Fine for alienation without licence, had lately beginning upon the original Creation of Seignories, so as this prerogative is as it were paramount the Seignory, and shall go paramount the Condition, as well as the Condition is paramount the Alienation, but if the disseisor of the Tenant of the King maketh a Feoffment in Fee, now upon the entrie of the disseisor, the person of the Feoffee shall be charged with a Fine, but the Land by the re-entry of the disseisor is discharged: and such is the opinion of the Lord Frowick, in his Reading upon the Statute of Prerogativa Regis, and the reason is, because the disseisor is not Tenant to the King, and so when he aliens, it cannot be said an Alienation by the Kings Tenant. See 45. E. 3. 6. If the Tenant of the King in chief leaseth for life with licence, and afterwards grants the Reversion over without licence, the Tenant for life is not bound to attorn in a Quid juris clamat; wherefore it seems, that if such Tenant doth attorn, the King shall seize presently. This Entry for the Condition broken is not to have so violent a retrospect to the first liberty to which the Condition was annexed, that it shall defeat all things meant between the Creation and the branch of the Condition, but it shall defeat all mean things which rise upon the act of the party, as Kent, Dower, &c. But charges which accrue by reason of Tenures, do remain, notwithstanding the Entry for the Condition broken: As if such a Tenant of the King maketh a Feoffment in Fee upon condition which is broken, the Feoffee dieth seised, his Heir of ful age, the Feoffor re-entereth this re-entry by force of the condition broken, hath not so avoided the descent, but the King shall have Relief upon the said descent, for the Relief is paramount the Liberty, and the condition. So if a Feoffee upon condition disclaim in Aboviry, by which the Lord brings a Writ of Right Sur Disclaimer, and hath Judgment; the Feoffee entred for the condition broken, the said re-entry shall not avoid the interest of the Lord by the Judgment on the Writ of Disclaimer, but he may enter at his pleasure; and it was moved by Plowden who argued for Tresham, that if the Tenant of the King, being Non Compos mentis, makes a Feoffment in Fee, and dyeth, his Heir entring upon the Feoffee shall not pay a Fine for the Alienation of his Father, but the person of the Father shall be charged with it. And at the end of this Term, after many Arguments and Motions, Judgment was given for the Queen, that she shold seize the Land and hold the same for the Fine, and that she shold not be driven to sue the person of the Feoffee or Conusee: And by Manwood cheif Baron, at the Common Law in many Mannors, Tenant in socage upon every alienation shall pay a Fine, nomine relevii a fortiori, in the Kings case, and therefore he was of opinion,

Entry for Con-
dition, what
acts it shall
defeat.

Condition
shall not avoid
an Interest
vested.

That

that this Pverogative to have a Fine for alienation without licence is by the common Law, and not by any Statute.

Mich. 25, and 26. Eliz. in the Exchequer Chamber.

XII. Caters Case.

A Bill of Intrusion was in the Exchequer against Cater, who pleaded the Incusione. Grant of the Queen, the Plaintiff replicando said, that before the Queen had any thing, &c. Sir Francis Englefield was seized of the Mannor, of which, &c. and he being beyond the Seas, the Queen sent her Letters under the Privy Seal, Quod ipse in fide, & legeantia quā dicta Reginz tenebatur, indirecte rediret in Angliam, predict. tamen Franciscus (spretis mandatis dict. Regina) venire recusavit, for which a Certificate was by the said Queen into the Chancery, Quod dictus Franciscus in portibus transmarinis sine licentia dict. Reginz remansit: And thereupon a condition was awarded to seize the Lands of the said Sir Francis, which was entered in the Replication in hac verba, reciting also the Queens Privy Seal, and that the said Sir Francis did stay there (spretis mandatis, &c.) for which the Queen seized and granted to the Plaintiff: And after-wards the Statutes of 13. and 14. Eliz. were made: after which the said grant was made to the Defendant, upon which matter there was a Demurrer and Judgment given for the Plaintiff. And now Cater brought a Writ of Error in Error. the Exchequer Chamber, and it was first assigned for Error, because that the Record is entered Inter Johannem Cater present. hic in Curia by I S Attorneyatum suum, and that cannot be, for it is oppositum in objecto. that one can be present in Court and also by Attorney, simul & semel, for the Attorney is to supply the default of the personal presence. To which it was said by Wray, Anderson and Periam, that the matter assigned was no Error, for there are many Presidents in the Exchequer of such Entries, which were openly shewed in Court. 48 E 3. 10. R 2. 20 H 7. 20 H 8. And by Mawood this Baron it is not so absurd an Entry as it hath been objected, for if one hath an Attorney of Record in the Kings Bench, and he himself is in the Marshalsey, there in an Action against him, he is present as Prisoner, and also by Attorney; and by them notwithstanding that here appeareth a contrariety, for such entire property (presentem hic in Curia in propriâ persona sua) yet because many proceedings are according, it is the more safe course to follow them, for if this Judgment be reversed for this cause, many Records should be also reversed which should be very perillous: Another Error was assigned, because it is not alledged in the Replication, of what date the Privy Seal was, nor that any notice of the said Privy Seal was given to Sir Francis, to which it was said, that the Privy Seal need not any date especially in this case, for the matters which are under the Privy Seal are not issuable. See 2 Eliz. Dyer. 177. nor any traverse Privy Seal. can be taken to it, and this Privy Seal is not as other Writs and Preceipes are, returnable in any Court, but the Queen her self from whom originally it came shall receive it, and also the Melleage upon it, and she her self in such case is Judge of the contempt, and no Record of that Privy Seal doth remain in any Court, but the Queen her self shall keep it, and then when the Queen is informed of the contempt, she makes a Warrant sometimes to the Chancellor to award a Commission, sometimes to the Treasurer and Barons of the Exchequer to the same purpose to seize the Lands, and that Warrant is signed, with the Seal manual of the Queen, and the Queen may certify, and set down the cause of such seizure in such Warrant, and no other Certificats is made by the Queen, and the Queen may certify the same Commission by word of mouth, and if the other party will say, that the Queen hath not certified it, he shall be concluded by the commission which is under the great Seal, and divers Pre-

Fugitives.

dents were shewed openly in Court to that effect. And all the matter aforesaid, was agreed by the Chancellor, Treasurer, and the said Justices, and no certificate at all needs to be in the Case, and then a superfluous Certificate being thought, shall not part: for Pugation is surplusage. Another matter was to consider, what interest the Queen hath in the Lands of Fugitives by the common Law; And as to that they were all clear of opinion, that the Queen in such case as aforesaid may seize, and assigne her interest over: And that such Assignees may grant Copy-holds, parcell of the Manors assigned, which grants shall bind him who cometh in after, cum manus Domini regis amoventur, and also when the Statutes of 13. and 14. of Eliz. come, the Statutes doe not amend the estate of the Queen, but the estate of the Queen doth continue as before, and all the Estates under it. And there was shewed unto the Court divers Presidents of seisures in such Cases, 18. E. 2. Edmond de Woolstock, Earl of Kent went beyond Sea without License of the King, and he went with Robert de Mortimer, and the King did certifie the same into the Chancery, reciting that he had sent his Privy Seal, &c. but that the said Edmond (spretis mandatis nostris redire reculayit) upon which issued a commission to seize, &c. And it was holden that the Queen having seized by by force of the common Law, and making a grant of a Copy-hold out of it, now when the Statutes of 13. & 14. Eliz. are made, shee hath not any estate thereby, for shee had such interest before, and this new seizure after the Statutes works nothing, and nothing accrues to her thereby, whereof shee can make a seizure: For shee hath departed with the whole before, See 23. Eliz. Dyer, 376. And note, that the grant of the Queen in the case at Bar was, quamdiu in manibus nostris fore contigerit. And afterwards Judgement was given, that judicium predictum in omnibus affirmetur.

Ter. Mich: 25. and 26. Eliz. in the Common Pleas.

Tithes.

XIII. Sutton, and Dowse Case.

Sutton, Vicar of Longstoke, Libelled against Dowse in the spirituall Court, and shewed in his Libel, that upon the Creation and Endowment of his Vicarage, four quarters of Corne were assigned to the Vicar out of the Granary of the Prior of B, of the Tithes of the Parsonage of Longstoke, and that the Parson or Fermor of the said Rectory of Longstoke, had alwayes paid the said four Quarters of Corne to the said Vicar and all his Predecessors, and alledged further, that the Lord Sands was seised of the said Rectory, and leased the Barne and Tithe-Corne parcell of the said Rectory, to the said Dowse, his wife, and son, Habendum to Dowse for Termes of his life, the Remainder to the wife for Termes of her life, the Remainder to the Son for life: And shewed further, that the said Dowse had covenanted with the said Lord Sands, to render the said four Quarters of Wheate to the Vicar and his successors, upon which Dowse procured a prohibition, and Sutton prayed a consultation, and it was moved in Day of the consultation that the Vicar had Libelled upon a Covenant which Dowse is taxed to pay the said Corne, and that is a lay Title, and determinable by the Law of the Land, and not in the Ecclesiasticall Court: But as to that the opinion of the Court was, that the Libel is not grounded upon the covenant, as the sole Title to the said Corne against Dowse, but upon the Endowment of the Vicarage, and the Lease by which Dowse is become Fermor of the Rectory: Another matter was moved, because that upon the Libel it appeareth, that the Lease aforesaid made by the Lord Sands was made to Dowse his wife, and his Son, jointly, in the Premisses, Habendum ut supra, in which case it was objected, that Dowse his wife, and his Son, are all three Fermors of the said Barne and Tithes jointly in possession, against all whom Sutton too

ton ought to have libelled, &c. and not against Dowse only, for the Habendum hath not severed their estates which were joyned before, quod tota curia negavit, for the Habendum hath severed the joyned estates limited by the Premisses, and hath distinguished it into Remainders, but if the Habendum had been, Habendum successive, the estate had remained joyned: Another matter was moved, because it appeareth upon the Libel, that the Parson, or Fermor of the said Rectory ought to pay to the Vicar the said Coynes, and also it appeareth upon the plaint that Dowse is not Parson, nor Fermor of the said Rectory, for the Lord Sands had leased to Dowse and his Son, but the Barne and the Litle-Corne parcell of the said Rectory doth remaine in the Lord Sands, in which case the said Sir, ought to have libelled against the Lord Sands, and Dowse, and not against Dowse only; And for that cause the consultation was denied. And in this case it was farther agreed by the Court, that if upon a Libel in the Spirituall Court, the Defendant makes a surmise in Banco to have a Prohibition, if such surmise be insufficient, the other party needeth not to demur upon it, and to have it entered upon Record, but as amicus Curiz, he shall shew the same to the Court, and the Court shall discharge him.

Mich. 25. and 26. Eliz. In the Kings Bench.

XIV. Punsany, and Leaders Case.

Prescription
of Foldage. Osmond Punsany brought an Action upon the case against Leader, and declared, that one Bedingfeld was seised of the Mannor of D, and that he and all those whose estate he hath in the said Mannor, time out of mind have had, libertatem Faldagij, & cursum omnium, in the Towne of D, & pro metiori pasturatione omnium suorum, the Inhabitants of the said Towne having any Lands within the said Towne, every second yeare left their Lands to lyze fresh and untilled, and prescribed further, that the Tenants of the Lands within the said Towne might erect Herdals in their lands, with the License of the Lord of the said Mannor, and not otherwise: and further declared, that the said Bedingfeld had let to him the said Mannor, and that the Defendant had erected Herdals upon his Lands without License, so as the profit of his Foldage is impaire by it: And all this matter was found by Verdict: And it was objected in Stay of Judgment, that the prescription is not good, for it is against Law and common right to abridge the Subject of the profits of his Lands: But the whole Court was clear of opinion, that the prescription is good enough, as 15. E. 2. Prescription 51. Prescription to have common appendant in other Land after that the Hay is cut, and v. E. 1. Prescription, 55. A seised of Lands may Plow it and Sow it, and cut and carry away the Coyne, and afterwards when the Coyne is carryed, by prescription may have the said Land as his several, and the other who sowed it cannot medle with that land, but to plough and sow it in season, &c. And the Cattell cannot eat and pasture in the Land when they come to plow or sow it, or to carry it away, nor have any profit but the Coyne, and yet the freehold of the Land is in such person, &c. and that was holden a good Prescription, and a difference was taken by the Court, where one doth prescribe to take away the whole interest of the Owner of the Land, and where a particular profit is restrained: And here this prescription doth not extend but to restraine the Tenant to erect Herdals, which is a reasonable prescription, see 1. H. 7. 24. The Lord of the Towne doth prescribe to have free Foldage of the Beasts of his Tenants in D, and see there, that libera Falda is not any other, but to have the Beasts of the Tenants to manure the lands of the Lord, &c. And afterwards Punsany the Plaintiff had Judgement to recover.

XVI. M. twenty five, and twenty six Eliz. at Serjeants Inn.

In the Dutchy Chamber, the case was, that King E. 8. leased for yeares to certaine lands parcel of his Dutchy of Lancastur, rending rent with clause of re-enter, and that lease was made to one Bony; It was found by advice that the Rent was arrear, and by another Office, that the Servant of the said Lessor, had noted the rent in the absence, and by the commandment of his Master and that afterwards one I S. Recitor Generall of the Dutchy, received the said Rent, and had accounted for it, and upon his account it was allowed; And this matter was opened at Serjeants Inn in Fleet-street, before Wray, Anderson, Manwood, Clench, Rhodes, Plowden, and Stanhope, and it was argued by Shuteworth, that in this case of rent reserved upon Lease for years, made by the King of Dutchy Land, the King is not bound to demand it, but he may so de-
The King not
bound to de-
mand Rent. fault of payment of it, re-enter without demand, & that the Lessor is tyed to tender it at his peril, as wel as if the Queen had been seised of the said land in the right of her Crown, and as to that payment, the Statute of 1. H. 4. is to be consider-
ed, by which it is enacted, that the possessions of the said Dutchy Taliter, & tali modo, & per tales officiarios & ministros in omnibus remaneant, deducantur, & gubernentur sicut remanere, deduci, & gubernari debuissent, si ad culmen Regis Dignitatis assumpti non fuissimus, and these words ought to be intended of things which concerne the Lands themselves, but this Act of demand is a personall thing, and concernes the person of the King, and toucheth the Majestie, and dignitie of the King, and in all cases of the Dutchy the person of the King shall hold his privilege, notwithstanding that the possession of the Land be carried in the course of a private person: And therefore if the Queen will alien Lands par-
cell of her Dutchy, shee ought to make Liberty, for now shee medles with the possession it selfe: but if the Queen will sue for parcell of her Dutchy, non omittas shall be in the writ, for shee cannot sue but as Queen, and the Queen hath such Prerogative, that none shall execute her writs at her own suite, but the Officer of the Crowne, 21. E. 4. 60. for Liberty if it be not Land within the County Palatine, and for the residue, See 10. H. 4. 7. 3. Eliz. 216, 217. Plowden, Lessor for years of Lands of the Dutchy, shall have aid of the King before Issue joyned, &c. And if the King make a Feoffment of Lands of his Dutchy out of the County Palatine, to hold of him in Capite, the Feoffee shall hold it so, and a Feoffment of such Lands upon condition that the Feoffee shall not alien is a good condition, and Aples shall not binde the Queen in case of an Ad-
allowance which the Queen hath in the right of the Dutchy, and if the villain of the Queen in the right of the Dutchy purchaseth Lands in Fee, and aliens, yet the Queen shall seise, and that hath been adjudged in the Exchequer Chamber, and if the Queen make a Lease of such Land, and afterwards makes another Lease of the same Land without recitall of the first Lease, it hath been adjudged that the second Lease is void. It was argued contrary by Beaumont the younger, that this condition which goeth to the realty, to reduce the Land againe, ought to be ordered and governed by the Queen, as it ought to be by a Subject; and therefore, if the Queen will take advantage of this condition, shee ought to make a Letter of Attorney under the Dutchy Seal, to her own Officer, autho-
rizing him therby to make demand of the said Rent, &c. And by Shuteworth here be two Offices, the one contrary to the other, the best shall be taken for the Queen, 14. E. 4. 5. in Skreems Case in the end of it: And if the Rent of the Kings Farms be behind, now although that after the Receivour of the Dutchy both receive it, yet the same doth not purge the forfeiture, as if the Bayliffs of a Mannor receive rent of a new Feoffee, the same will not change the Avoirie of the Lord without notice given to him, 41. E. 3. 26. And if a Copy-hold escheat,

escheat, the Steward without a special Warrant cannot grant it over De novo.

March. 25, and 26. Eliz. in the Kings Bench.

XVI. Rearsbie and Rearsbies Case Intraf. Trinit. 25 Eliz. rot. 746;

Replevin by W Rearsbie and A Rearsbie against L Rearsbie, who abovn the Distresse, because that one W Vavafour was seised of the Mannor of Denby, whereof the place where, &c. is parcel in his Demesne as of Fee, and so seised gave the said Mannor to one L Rearsbie Father of the Plaintiff, and of the Abowant and Jane his Wife, and to the Heirs of Lyonel, who by his Will devised unto A Rearsbie a Rent of four pounds out of the said Mannor, with clause of Distresse, for his childs part, to be yearly paid, Lyonel the Father dyed 3. Eliz. and afterwards, 22. Eliz. Jane dyed, and for the arrearages of the said Rent encurred mean between the death of Lyonel and Jane his Wife, &c. upon which Abowry the Plaintiff did demur in Law, for the Rent doth not begin in esse, but after the death of the Wife of the Deviler, for such construction ought to be made of the Devise, as not to charge the Inheritance with the whole arrearages, &c. and it was argued to the contrary, that the Defendant might well abov the distresse for these arrearages, for if he in the Reversion upon a Lease for life grant a Rent charge after the death of the Grante, the Grante shall distrein for all the arrearages encurred after the grant, etiam, during the life of the Distresser, quod Curia concessit: and it was said by the Council of the Abowant, that the Case at Bar is a stronger Case, for this Rent, as it appeareth by the words of the Devise, was devised to the Abowant for his livelihood, and for his childs part, which words imply a present advancement, and these words yearly to be paid is strong and pregnant to that intent. It was adjourned.

Construction
of Deviser.

XVII. Hill. 25. Eliz. in the Kings Bench.

The Earl of Northumberland brought debt upon arrearages of Action, the Defendant shewed that before the Account, the Plaintiff of his own wrong Account did imprison the Defendant, and assigned Auditors to him being in prison, and so the Account was made by durelse of imprisonment: And the same was holden a good Plea by all the Justices of both the Benches. And Judgment was given accordingly.

XVIII. Pasch. 26. Eliz. in the Kings Bench.

Pasch. 26. Eliz.

Forman and Bohans Case.

Replevin by Forman against Bohan, the Defendant abovd for a Rent charge, and shewed, that one Wingsfield was seised of the Mannor of Wesham, whereof the place where, was parcel: And 33. H.6. made a Croftment in Fee of the place where, &c. to one Orlow, rendering Rent and suit at the Court of the said Mannor, and that the said Wingsfield was seised of the said Rent and Suit accordingly, and dyed thereof seised, and that the same descended to Anchony Wingsfield as Son and Heir, &c. who was seised of the said Rent as parcel of the said Mannor, and that the said Anchony, so seised of the said Mannor and Rent, bargained and sold the said Mannor & Rent, 26. H.8. to Nicholas Bohan Father of the Abowant, by these words; Manerium de Wesham, et omnes omnimodas redditus, reputatus, deemed, or adjudged part or parcel of the said Mannor, who entered, and died seised, and the same descended to the now Abowant, as Son and Heir,

Heir, &c. and averred, that the said Kent at the time of the bargain and sale aforesaid, et diu ante, was reputed parcel of the Mannor aforesaid: Upon which A. bovsky, the Plaintiff did demurre in Law, and it was argued by Gawdy Her, Tenant for the Plaintiff, and he took an Exception to the Abovwy, because the Abowlyt Helweth, that Anthony Wingfield 26. H. 8. bargained and sold the said Mannor to Bohan Virtute Quar. bargaine et venditionis, et vigor. cuiusdem Actus Parlamenti 27. H. 8. de usibus, &c. the said Bohan was seised, &c. where he ought to have said; by force of which bargain and sale the said Anthony Wingfield was seised of the said Mannor aforesaid, to the use of the said Bohan, and that afterwards by reason of the said Statute of 27. H. 8. the said Anthony then seised to the use aforesaid, the said Bohan was seised in his Demesne as of Fee: For it might be for any thing appearing in the Abovwy, that before the said Statute of 27. H. 8. Anthony Wingfield had made a conveyance upon consideration to him who had not notice of the use, so as the use being suspended, when the Statute came, it could not be executed, for there was not any seisin to the use, and to that purpose he cited the Case of 7. H. 7. 3. where a gift of Trees by Cestuy que use is pleaded, without alledging that the Feoffors were seised to the use of the Donor at the time of the gift; To that Exception it was answered by Popham Attorney General, That there is a difference betwixt the Case at Barre, and the Case of 7. H. 7. for where a man entitles himself by Cestuy que use, he ought to maintain such title by every necessary Circumstance, which the Law without expressing will not intend, but where a man alledgedeth a matter, which is but a conveyance, there needs no especial recital; as if a man will pretend the grant of a Reversion, & that the lessee for years did attorn, he needs not to shew, that at the time of the Attornement the Grantor was seised, &c. and he cited the Case of 10. E. 4. 18. In Trespass, the Plaintiff by way of Replication made to him a title, that A was seised and leased to him at Will; by force of which the Plaintiff was possessed, until the Defendant did the Trespass, and Exception was taken to it, that the Plaintiff in his Replication had not averred, that A was alive at the time of Trespass, and it was not allowed, for the subsequent words (by force of which the Plaintiff was possessed until the Defendant did the Trespass) do amount unto so much, for the Plaintiff could not be possessed by force of the said Lease at Will, if A were not alive. So here, Bohan could not be here seised by force of the said Statute, if the seisin of the use which was raised by the bargain and sale had not continued until the coming of the said Statute: As to the matter in Law, Gawdy conceived that the Averment in the purchase of the Abovwy is contrary to the matter of the Abovwy, for the creation of the Kent set forth in the Abovwy proves, that the Kent is not parcel of the Mannor, but a Kent in gross, and then the general averment, that the Kent is parcel of the Mannor, without shewing how, against the special matter of the Abovwy, is not receivable. And also nothing can be by reputation parcel of a Mannor which in rei veritate cannot be parcel of a Mannor, but a Kent charge cannot be in rei veritate parcel of a Mannor, ergo, nor by reputation: Popham contrary; That the Averment is not contrary to the matter of the Abovwy, for the matter disclosed in the Abovwy proves, that it is not rei veritate parcel of the Mannor, but it doth not exclude Reputation, and the Averment doth not extend ad veritatem facti, which is set forth in the Abovwy, but only to reputation, and so both stand together well enough: And that a Kent charge may be parcel of a Mannor, see 22. E. 3. 13. 31. E. 3. 23. in the Lord Tiptofts Case, where it is ruled, that title made to a Kent charge as parcel of a Mannor is a good title, and the Allize awarded upon it, and in our Case the Reputation is enforced by the suit at the Court, which was also referred upon the said Feoffment together with the said Kent, so as the intent of the parties to the Feoffment was, that this Kent so reserved and accompanied with the said suit shall be esteemed a Kent service, and so parcel of the Mannor, and as to the continuance of Reputation it sufficeth, if at the time of the

Averment.

Reputation.

Rent charge
parcel of a
Mannor.

the

the bargain and sale aforesaid, which was 26. H 8. it was by many reputed parcel of the Manors, and he cited the Case of the Marquesse of Winchester: The King gave to his Ancestoz the Manors of Dale and all lands then antea reputed parcel of the said Manors, and in a Bill of Intrusion against the said Marquesse he pleaded the grant with averment, that the Land then antea reputed parcel Manerii predict. And because he did not shew certainly at what time the Land was reputed parcel of the Manors, Judgment was given for the Queen, for it might be for any thing in his Plea, that the said Land was reputed parcel of the said Manors before time of memory, which Reputation would not serve: but such Reputation ought to be within time of memory and understanding: He cited also the Case of the Earl of Leicester. King Edward the sixth seised of the Manors of Clibery, of which a Wood was parcel, granted the said Wood in fee, which afterwards escheated to the King for Treason; Queen Mary granted the said Wood to another in fee, who granted it to the now Queen, who granted the said Manors & omnes boscos modo vel ante hac cognit. vel reputat. ut pars, membr. vel parcel. Maner. predict. to the Earl of Leicester, and it was resolved in the Exchequer, that by that grant the said Wood did passe to the Earl, and Judgment was given against the Queen, for it was part of the Manors in the time of E 6. at which time (ant hac) without the word (unquam) shall be extended ad quodamcunque tempus præteritum. And Reputation needs not so ancient a Pedigree for to establish it; for general acceptance will produce reputation: As the house of the Lord Treasurer now called Tibbould was now of late a private Manor, but now hath a new name by which it is known, and that within these twenty years, which is not so long a time as we have alledged for our Reputation, and would passe in a conveyance by such name, so None such. But as to Reputation, I conceive that Reputation is not what this or what that man thinketh, but that which many men have said or thought, who have more reason to know it; & quoniam est inter illos reputatio: Tunc quid. There was a Case ruled in the Exchequer 13. Eliz. in a Bill of intrusion; the Case was, that King Hen. 6. was seised of a Manor, to which a Pele was regar- dant, who purchased Lands which the King seised, and let by Copy as parcel of the said Manors, and so continued until the time of E 6. who granted the same to Allice Hardwick, and all Lands, Tenements, reputed parcel of the said Manors; And it was adjudged, that the said Land so purchased by the said Pele, and demised by Copy, did passe by the said grant to Hardwick. And afterwards, the same Term, the Justices, without any solemn Argument, shewed their opinions in the principal Case, viz. That this Rent did not passe by the bargain and sale made as above, by Anthony Wingfield, to Bohan father of the Avowant; for here in the premises of the Avoway is not any matter set forth imputing Reputation, or by which it may appear that the Rent in question was ever reputed parcel of the said Manors, but rather to the contrary, and the bare averment of Reputation in the conclusion of the Avoway is not sufficient to induce Reputation. But if the Avowant had set forth in his Avoway any special matter to induce the Court to conceive a Reputation upon the matter of the Avoway, to shew that the Wayliss of the said Manors had alwayes received the said Rent as parcel of the said Manors, and as Wayliss of the said Manors has accounted for it, as parcel of the Manors, and that the Lessors of the said Manors had enjoyed the said Rent as parcel of the said Manors, the same has been good matter to induce a Reputation, and to have incorporated the said Rent with the said Manors: and so judgment was given against the Avowant, and of such opinion (as was affirmed by Wray) was Anderson, chief Justice of the Common Pleas, and Manwood, cheif Baron of the Exchequer.

Tasch. 26. Eliz. in the Kings Bench.

XIX. Cham and Dovers Case.

Ejectione
fir-
me.

Custome, ad
pasturandum
non ad colen-
dum.

Dower, dis-
charged of a
grant of Co-
py-hold.

In an Ejectione firme, the Case was, that one Michell was seised of the Man-
nos of D, within which diverse parcels of Land, part of the said Mannoz, were
customary Tenements demised and demisable by copy, &c. according to the
Custome of the said Mannoz for one, two, or three lives, within which Mannoz
there was a Custome, scil. that the Lord of the Mannoz, for the time being,
might grant Copy-hold estates for life in Reversion; The Lord granted such
Lands for life by copy in possession, tooke a wife, and granted the same Copy-
hold to a stranger in Reversion for life, and dyed, the Copy-holder in posse-
sion dyed, the Land demise by copy is (inter alia) assigned to the Wife for her
Dower, who had Judgement to recover in a Writ of Dower, who entred and
made a Lease thereof to the Defendant, who entred, against whom, the Lessee
of the Copyholder brought Ejectione firme, and all his matter was found by
Verdit, and further found, that every Copyholder of the said Mannoz, might
Lease his Copy-hold for a year, ad pasturandum, sed non ad colendum, and that
the Lease made to the Plaintiff was for a year, ad pasturandum. Popham Atto-
ney General, of Council with the Defendant, tooke exception to the Declara-
tion, because the Plaintiff had declared a Lease at the common Law, and the
Jury have found a Lease by the custome which cannot stand together: And such
a Verdit doth not maintaine the Declaration, as if the Plaintiff had declared
upon a Lease for years of Lands, and the Jury found a devise for years, &c.
but the exception was disallowed by the Court: As to the matter in Law he argu-
ed, that the Tenant in Dower should hold the Land discharged of the Copy-
hold for her life, and he put this case, If the Lord of such a Mannoz taketh a
Wife, a Copy-holder for life dyeth, the Lord grants a Rent-charge out of the
customary land, and afterwards grants the said land by copy for life and dyeth,
the wife shall hold the land discharged of the Rent, but the Copy-holder shall be
charged, and he put a difference where the Lord grants such Copy-hold in pos-
session, and where in Reversion, for in the first case the Wife shall hold charged,
but contrary in the last: And he cited the Case of one Slowman, who being
Lord of a Mannoz (ut supra) by his Will devised, that his Executors should
grant estates by Copy, and dyed having a Wife, the Executors make estates
accordingly, the Wife in case of Dower shall avoid them: Plowden contr. the
Lord of such a Mannoz is bound by recognisance, and afterwards a Copy-holder
for life of the said Mannoz dyeth, the Lord grants his Copy-hold, de novo, the
said new Grantee shall hold his Copy-hold discharged of the Recognisance
which Gaudy Justice granted, and by Wray if the Lord of such a Mannoz grants
a Copy-hold for three lives, takes a Wife, the three lives end, the Lord enters
and keeps the lands for a time, and afterwards grants them over again by copy,
and dyeth, the copy-holder shall hold the land discharged of the Dower, and this
is a clear case, for the copy-holder is in by the custome which is paramount, the
title of Dower and the Heirship of the Husband, and by him in the case of the
Earle of Northumberland, 17. Eliz. Dyer 344. That the grant of a copy-hold
in Reversion by the Earle of Northumberland, doth not make such an impedi-
ment as was intended in the condition there, for it is by the custome, and not by
the act of the partie. And afterwards, the same Terme Judgement was given
for the Plaintiff, that he and his Lessor should hold the lands discharged of the
Dower.

Pasch. twenty six Eliz. In the Kings Bench.

XX. Fringe and Lewes Case. •

Debt by Fringe against Lewes upon a Bond, who pleaded, that the condition was, that whereas the Defendant was Executor to one Morris Degle, ^{Debt.} that if the Defendant should performe, obserue, fulfill, and keep the Will of the said Morris Degle in all points and Articles, according to the true intent and meaning thereof, that then, &c. and pleaded further, that the said Morris by the said Will bequeathed to the Pooze of such a Towne ten pounds, to be distributed amongst them, and also to the Church-wardens of the Parish ten pounds, and to 1 S three pounds, and that he had distributed the said ten pounds to the Pooze, and that he had paid the ten pounds to the Church-wardens, and as to thre pounds, he said that he is and alwayes was ready to pay the same to the said 1 S if he had demanded it, upon which there was a demurrer: And as to the ten pounds to be distributed amongst the Pooz, the same was holden good enough ^{uncore pris.} a good Plea. without shewing the names of the Pooze amongst whom the mony was distributed; so the pleading of the first payment to the Church-wardens was holden sufficient without naming of them. See 42 E. 3. breif, 539. Scire facias out of a Recovery against Executors, and the Writ was challenged, because it was, Scire facias Executor, not naming their proper names; It was holden to be no exception, for Executors are as a corporacion known in that, they are Executors and as to the third part of the Plea, scil. alwaises ready and yet is, the plea is well enough, for this Obligation (the Condition of which being general to performe the Will &c.) hath not altered the nature of the payment of the Legacy, but the same remains payable in such manner as before upon request, and not at the peril of the Defendant. See 22 H. 5. 57 58. 11 E. 4. 10. 6 E 6 Br. Tender 60. And afterwards the same Term, the Court was clear of Opinion, and so delivered the Law to the Counsell on both sides, that in this case the Legacies are to be paid upon request, and not at the perill of the Executors in such manner as they were before the Obligation, and afterwards Judgement was given against the Plaintiff.

Pasch. 26. Eliz. In the Kings Bench.

XXI. Sir John Smith, and Peazes Case.

Sir John Smith brought Debt upon an Obligation against Peaze, who pleaded, that the Bond was upon condition to performe covenants contained in an Indenture, and shewed what, and that he had performede them, the Plaintiff assigned the breach of one covenant, that where the Plaintiff had leased to the Defendant for years, certaine messuages by the same Indenture, the Defendant by the same Indenture did covenant to repair all the said Messuages, alia quam quæ appunctuata forent divelli præscript. dicti Johannis Smith, and shewed further, that the Defendant had not repaired the said Messuages to him demised as aforesaid, and averred that the said house in which the breach of the covenant is assigned, non fuit durante termino predicto appunctuata divelli, and upon that matter of reparation they were at Issue, and found for the Plaintiff: It was moved in Arrest of Judgement, that the Averment in the Replication was not sufficient, for the Lease was made in November to begin the Michael, after, and it might be that the Messuage, in the not repaying of which the breach of Averment, the covenant is assigned, was appointed to be pulled down, scil. divelli, before the Term for years began, and then the Defendant is not bound to repair it, and then the breach of the covenant is not well assigned, and so the Aver-

ment doth not answer the exception, and because this clause (alia quam) is in the body of the Covenant, it ought to be satisfied by him who pleads it, scil. by him who assignes the breach in the Covenant, in which the exception is contained; As by the Lord Dyer in his argument, in the argument of Stowels Case, reported by Plowden 376. Where a man pleaded the Feoffment of Cestuy que use, he ought to plead, that Cestuy que use, at the time of the Feoffment was of full age, sine memorie, &c. for that is within the purview, contr. upon the Statute of 4. H. 7. in pleading of a Fine, for that is in a clause by it selfe, which conceit of Plowden, the Lord Wray denied to be Law, for he said, he that pleads the Feoffment of Cestuy que use, or a fine according to the Statute of 4. H. 7. shall not be driven to shew that the Feoffor, or Conisor at the time of the Feoffment, or Fine levied was of full age, &c. but he who comes in by such Fine, or Feoffment shall shew the same for his own advantage; and at last after many motions it was resolved by all the Justices, that the Averment aforesaid was superfluous & ex abundanti, for it had been sufficient for the Plaintiff to have assigned the breach of the Covenant in the not repaying of Pessnages without any Averment, de non appunctuando, and if the house in the not repaying of which the breach of Covenant is assigned, was appointed to be pulled down, the same shall come in on the Defendants part to whose advantage it trencheth, for such appointment doth discharge the Covenant as to that: In the same Plea, it was moved in stay of Judgement, that one Sharpe, Solicitor of the said Sir John in the said suit, had given eight shillings to the Jurors mean betwixt the Charge, and their Verdit, and that matter was testified by the oaths of two men, upon which the Court examined the said Sharpe, who upon his oath denied the matter, and also the Foreman of the Jury to whom the money was supposed to be given, who upon his oath denied the same: And it was moved, if receipt of money by any of the Jurors should make the Verdit void, and by Wray it shall not, for it is but a malice peccator, which is punishable on the person of him who takes the money: But Gaudy and Ayliff Justices, the Verdit is void. See 24. E. 3. 24. 14. H. 7. 1. 20. H. 7. 30. And so that causes the Judgement was reversed.

Pasch. 26. Eliz. Intr. Trin. 25. Eliz. Rot. 492. In the Kings Bench.

XXII. Cordall and Gibbons Case.

Cordall an Ejectione firmæ, upon not guilty pleaded this Jury found the speciall matter, viz. that one Hieron Heydon was seised of two Houses, whereof the Action is brought, and came to Cordall the Plaintiff, and prayed him to lend him ten pounds, Cordall asked him, what assurance he would give him for the repayment of it, he answered, that he would mortgage to him the said two Houses, whereupon Cordall lent him the money, and afterwards they both went to the said two Houses, and being before the doors, of them, Heydon called Tenants at will of the Houses, and said to them, Sirs, I have borrowed of this Cordall ten pounds upon these Houses, and if I pay this money at Michaelmas next, I must have my Houses againe, and if not, then I bargaine and sell these Houses to Cordall, and my will is, that you become his Tenants, after which Heydon put the said Cordall into the Houses, and sealing him in the Houses, he put in the keys of the Houses to the said Cordall, by the Windows, &c. And it was adjudged by the whole Court, that this conveyance, by word of mouth, was good enough to passe the estate, ut supra, and the words of bargaine and sale in this Case, are as strong, as of grant and grant, See 38 E. 3. 11. 43 E. 3. 11. 27 E. 3. 69. 28 E. 3. 11.

Pasch. 26. Eliz. Instr. Mich. 25. & 26. Eliz. Rot. 72: In the Kings Bench.

XXIII. Richards and Bartlets Case.

Dorothy Richards Executrix of A, her former Husband, brought an Action upon the Case upon a promise against Humphrey Bartlet; and declared, that in consideration of two weighes of Corn delivered by the Testator to the Defendant, he did promise to pay to the Plaintiff ten pounds, to which the Defendant said, that after the Assumption the Plaintiff in consideration, that the said two weighes were drawn by Tempest, and in consideration that the Defendant would pay to the Plaintiff for every twenty shillings of the said ten pounds three shillings four pence, scil. in toto thirty three shillings four pence, did discharge the said Defendant of the said promise, and averred further, that he hath been always ready to pay the said sum newly agreed, upon which there was a demurrer. And the opinion of the whole Court was clearly with the Plaintiff, first because that here is not any consideration set forth in the Bar, by reason whereof the Plaintiff should discharge the defendant of this matter, for no p^rfit but damage comes to the Plaintiff by this new agreement, and the Defendant is not put to any labore or charge by it, therefore here is not any agreement to bind the Plaintiff, See 19 H. 6. Accord, 1. 9 E. 4. 13. 12 H. 7. 15. See also Onlies Case, 19. Eliz. Dyer, then admitting, that the agreement had been sufficient, yet because, it is not executed, it is not any Bar: And afterwards Judgement was given for the Plaintiff.

Pasch. 26. Eliz. In the Kings Bench.

XXIV. Lendall, and Pinfolds Case.

In Trespass for breaking of his Close, by Lendal against Pinfold, the Case has that two brake the Close and entred, & did the Trespass, the Dower of the land Trespass? brought an Action of Trespass against one of them, and had Judgment, and execution accordingly, and afterwards brought Trespass against the other, and declared upon the same Trespass: And by Ayliff Justice, it is a good Bar, and he likened it to the case of one Cobham, who brought an Action of Trespass of Assault and Battery, and recovered and had execution, and afterwards brought an Appeal of Mayhem against the same person upon the same matter, the said Recovery and execution is a good Bar, &c. so here as to the breaking of the close, but not as to the Entry: But by Wray, it is a good Bar for the whole, and he likened it to the case of Littleton, Pl. 376. A Release to one of the Trespassers, shall discharge both, Gaudy agreed in opinion with Ayliff.

Pasch. 26. Eliz. In the Exchequer.

XXV. Kempe, and Hollingbrooks Case.

In an Ejectione sive for Tythes, the case was upon the Statute of 18. Eliz. Cap. 6. By which it is enacted, that no Masters, and Fellowes of any Colledge in Cambridge, or Oxford shall make any Lease for life, or years of any Farme, or of any their Lands, Tenements, or other Hereditaments to the which any Tythes, arable Land, Meadow, or pasture doth, or shall appertaine, unlesse the third part at least of the ancient Rent be reserved, and payed

in Corne for the said Colledges, &c. otherwise every Lease without such Reservation shall be void, &c. It now, the said Statute shall be construed to extend to Leases of such extraordinary pecuniary Tithes which are not naturall or paid in kind. It was argued, that the said Statute is to be intended of Tithes in kind, and also of such things to be demised which render Corne, Hay, &c. But the Tithes in London which is the thing demised in our case, doth not render any such thing, but only mony according to the decree made for the payment of Tithes in London in the time of E. 6. And although the words of the Statute be (other Hereditaments) to the which any Tithes, &c. Yet the said Statute doth extend to Tithes in grosse, but they ought to be such Tithes which are of such nature as Tithe-corn, and Tithe-hay: And Manhood cheif Baron held clearly, that the Lease of these Tithes is good enough, notwithstanding the defect by the speciall Reservation which is limited and appointed by the Statute, and so by him, a Lease of a House, Rent, Pill, Ferry, &c. are out of the said Statute: And as to the Tithes, notwithstanding the words of the Statute are generall, any Tithes; yet he conceived, the Statute ought to be intended of Tithes of common Right, and not of such customary Tithes as those of London are, and therefore, if all the Parishioners prescribe in modo Decimandi, scil. to pay a certaine sum of mony for all manner of Tithes, upon demise of such a Rectory, such speciall Reservation is not necessary, for these are Tithes against common Right, and no Tithes are within the purview of the laid Statute, but those which are annmall, and therefore a Lease of Tithe-wood is out of the meaning of this Statute, for non renovatur in annum, and he said that upon a Lease of the Tithes of Chirries, a rent ought to be reserved according to the Statute, and the Farmer may bring his Chirries to the Market, and buy Corne. Sicut Justice contrary, for the words of the Statute are generall, and note, that this Lease was of the Rectory of Saint Lawrence in the City of London, there was another matter moved in this case, because the lease wherof of the Action is brought, was made by the name of Master or Guardian, and the Fellowes, whereas the true name of their Colledge is Master and Fellowes. And it was argued by Atkinson, that the same is not such a Pilnosmer which makes the Lease void, for (sive custos) are words of surplusage, v. 7 H. 6. 13. And also the case of the Cookes, 20. Eliz. Plow. 531. The Corporation was by the name of Masters or Governors and Commonalty, mysterie coquorum, &c. And they made a conveyance by the name of Masters or Governors, and Commonalty, artis sive Mysteria, &c. The same is no such Pilnosmer as shall make void the conveyance, for Art and Mistry are both of one sense.

Misnomer.

Paseb. 26. Eliz. In the Kings Bench.

XXVI. Harvey, and Harvey's Case.

Consultation. Clare Harvey, one of the Daughters of Sir James Harvey Alderman of London libelled in the Spirituall Court against Sebastian Harvey, Son and Executoz of the said Sir James, for a Legacy bequeathed to her by her Father; Sebastian did not appear, for which he was excommunicated and taken by a Writ of excommunication, capiendo, and impisened, and afterwards he came into this Court, and furnished to the Court, That the said Sir James in his life had given to the said Sebastian all his Goods and Chattells, and was also bound unto the said Sebastian in Statute Caple of two thousand pounds, wherenpon he had a prohibition, and now the Plaintiffs counsell prayed a consultation, quatenus non agitur ad validatem facti, aut Statuti. And Egerton Sollicito of Counsell with the Plaintiff cited a Judgment given in the like Case betwixt Lodge and Luddington, where such a special consultation was granted: But Wray put a difference betwixt the said Case and the Case at Barre, for here in this Case is a gift by the Testator

Testator himself, but in the Case cited, the gift was by the Executor; and also here is a Statute of two thousand pounds, in which Case the Obligations which could not pass by the deed, shall be subject to the said Statute.

Trin. 26. Eliz. in the Exchequer.

XXVII. *The Duke of Northumberlands Case,*

The late Duke of Northumberland seized of five Possuages in the Parish of St. Sepulchres London, in the Tenure of W Gardiner, by deed indentured and enrolled for money bargained and sold to I L all his Tenements situate in the Parish of St. Andrews in Holborne in the Tenure of W Gardiner, to have to the said I L for life, the remainder to K his Daughter in Fee: Atkinson, The bargain and sale is void by reason of the Misnomer of the Parish, notwithstanding the truth of the Tenure, for by the grant and bargain and sale of all his Tenements in the Parish of St. Andrews nothing passeth, and the truth of the Tenure subsequent shall not help it: And by Manwood chief Baron, the sale is utterly void, for the fality doth proove the truth a certainty: And it was argued, that I L entering by colour of the same bargain and sale is a disseisor; as the Case is betwixt Croft and Howell, 20. Eliz. Com. 517. Yet if he was but Tenant at Will when he made the Lease for years, the same was a Disseisin to the said Duke; and then the Duke being disseised, he is attainted of treason, 10. Mariz. And now we are to see what things accrue to the Queen by the said Attainder: and as to that it was said, that at the Common Law a Right of Entry, should Escheat, but not without Office found thereof, no more then Lands in possession: And by the Statute of 26. H. 8. it is enacted, that every person attainted of high treason, shall forfeit all his Lands and Tenements which he had of any estate of Inheritances, by which Statute a Bishop, Abbot or Tenant in tail in such Case shall forfeit even without Office: But in the Statute of 33. H. 8. there is a saving to every other person all such right possession, so as in that Case by that Statute the King shall not be in possession without Office, but shall have a right, but cannot enter before Office or after. And he is to have a Sci. facias against him, who hath the possession, and he shall make his defence as well as he can, and the words of the said Statute, That the King shall be in actual possession, shall not be construed to extend to an actual and absolute possession, but such a possession only which he had at the Common Law after Office found, so as the Statute doth not give to the King a larger possession but an easier, without the circumstance of an Office: And of that opinion was Manwood chief Baron, and Shute second Baron: And then it was moved further by Coke, because that the Queen by the Attainder hath but a Right; and the Queen makes the grant of the Possuages themselves, the same grant is void. And he granted that the Queen might grant a real Action, and a Right of Entry; but such a grant ought to be concived in special words, as to say, That the Duke of Northumberland was seized of five Possuages, and by such a one disseised, and after the Duke was attainted, and so granted, for the Queen may grant such a Right by reason of her Prerogative, and therefore the same ought to be granted by special words, as in the Case of Mynes in the Commentaries, and according to that was the opinion of the Justices in Cromers Case, 8 Eliz. which Case see, reported by Coke in the Case of the Marquess of Winchester.

Trin.

Trinit. 26. Eliz. in the Kings Bench.

XXVIII. Dayrell and Thinns Case.

error. Edward Dayrell brought a Writ of Error against Sir John Thinns upon a Judgment had by the Defendant against the Plaintiff's Father of the Name of Mexden: And Error was assigned for want of warrant of Attorney. And the Plaintiff prayed one Certiorare to the chief Justice of the Common Pleas, and another Certiorare to the Custos Brevis, both which returned, non inveni aliquod warr. and now Sir John Thinn being dead, the Plaintiff brought another Writ of Error by Journeys accounts against John Thynn Son and Heir of the said Sir John Thinn, who appeared and alledged Diminution, in hoc, that the Warrant of Attorney is not certified, and prayed another Certiorare unto the chief Justice of the Bench, and another to the Custos Brevis, and it was argued by Clark, that in this Case Certiorare ought not be granted, for a Certificate is in the nature of a trial, which shall not be crossed in the same Action; but the parties to the Action, and their Heirs shall be bound by it, especially when the matter is certified by one who is Judge of the Record, and that Certiorare sued at the prayer of the Plaintiff shall be as peremptory, as if it had been sued at the prayer of the Defendant, 7 E 4. 25. by Yelverton. And a man cannot have Certiorare of a thing which is contrary to the Record, which is certified, 11 E 4. 10. by Laicon: So Diminution cannot be alledged in this Warrant of Attorney, because it hath been certified here, that no Warrant of Attorney is to be found, &c. 9 E 4. 32. by Billiny; Egerton, Solicitor contrary: For the Certiorare obtained at the suit of the Plaintiff, shall not prevent the Defendant. And the course of proceeding in a Writ of Error, when Error is assigned out of the Record, and not of a thing within the Record, is such: After Error assigned, before that a Sci. fac. issued against the Defendant ad audiendum errores, the Plaintiff may pray a Certiorare to the Custos Brevis, in whose hands such collateral things remain, for the Plea Roll doth remain in the custody of the chief Justice, but the Original Writs, Escoines and Warrants of Attorney remain in the hands of the Custos Brevis; and such a Certiorare the Court may grant to the Plaintiff, without making the Defendant party to it. And notwithstanding that the Defendant hath pleaded, in nullo est erratum, and so hath affirmed the Record to be such as is certified, yet the Court ex Officio, shall award a Certiorare to ascertain themselves if there be any such Warrant of Attorney or not: which see 9 E 4. 32. by Billiny, and therefore the Certiorare being awarded, ex Officio, shall not prejudice the Defendant; and to his purpose he cited the Case betwixt the Lord Norris and Braybrook in a Writ of Error, where the Lord Norris being Plaintiff prayed a Certiorare to the Custos Brevis, to certifie an Original Writ, upon which a common Recovery was had, and had it, and the Custos Brevis certified, that there was no Original; and afterwards the Defendant prayed another Certiorare, and had it: and so in our Case here especially, because the Defendant was not party to the Record, nor hath day in Court, at the time that the said Certiorare was granted, for the Defendant is not party before the Sci. facias ad audiendum errores be issued forth against him: and therefore he comes timely enough to pray a Certiorare. See 28 H 6. 10. and 11. And I grant that the Certificate upon a Certiorare which was awarded after a Sci. fac. ad audiendum errores is peremptory and final, but contrary where it is granted before the awarding of such Scire facias: See Book Entries 271. The Plaintiff assigneth Error in the Original Writ, & pete br. Domini Regis Custodibus Brevis, &c. ad breve illud origin. certificand, and upon the return of the Certiorare, the Plaintiff prayed a Scire facias ad audiendum errores. And see there 293. where it appeareth, fol. 271. that Certiorare

tiorare issued at the suit of the Defendant in Error after he had alledged Diminution : and that is after Scire facias ad audiendum errores returned ; and see Certiorare before Sci. facias awarded 271, &c. and this Certiorare is only ex officio, and awarded only to enforw the Court : And in respect of the Certiorare the cheif Justice of the Common Pleas, to whom the Certiorare is directed, is but a Minister, and not a Judge. And as to the Case of 9 E. 4. 32. before cited, he could not have a Certiorare, for he could not alledge Diminution, because he had pleaded in Nullo est erratum, by which Plea he had confessed the Record which is certified to be a full and perfect Record, and fully certified, and against that matter he shall not alledge Diminution : And in our Case there is not any such contrariety as hath been objected, for the return of the certiorare is, Non inveni aliquod warrant, not precisely, quod non habetur aliquod warrantum; And therefore if the Court now at the prayer of the Defendant grant another certiorare, upon which is a Return (quod habetur warr. Attornat.) the same is not contrary to the return of the first Certificate, but they both may stand together, for upon further search such Warrant of Attorney may be found : so upon the matter the Court shall not be embigled by any such contrariety, for (non-inveni aliquod Warrant.) returned upon the first certiorare, and inveni quoddam warr.) upon the second certiorare are not meer contrary; And it seemed to Wray cheif Justice, that it would be hard to grant a new certiorare in this Case, but if any variance could be alledged it should be otherwise, as it was adjudged in the Case of one Lassell, who certified no Warrant of Attorney, and afterwards it was moved for another certiorare, as it is here, and because the Original was inter Johannem Lassell ar. executor. Testi. &c. where he was not named Executor in the first certiorare, upon that matter a new certiorare was granted.

Diminution.

Trin. 26. Ehz. In the Kings Bench.

X X I X. Withy and Saunders Case.

Withy libelled against Saunders in the Spiritual Court, and now came Tyths will not pass by grant without deed.

Withy libelled against Saunders and surmised, that Withy had libelled against him for Tyth, grasse, and shewred, that all the claim that Withy had to the said Tyths was by a grant made without deed, and by the Law such things would not passe without deed; And also that the Spiritual Court would not allow of this Plea, and therfore prayed prohibition: And the Court upon the first Motion conceived a prohibition should passe, for if the grant be without deed, nothing pasted, and then hath not Withy cause to claim these Tyths against the said Saunders. And notwithstanding that Tyths are quodam modo spiritual things, and so demandable in a Court of that nature, yet now in divers respects they are become a Lay-fee, and lay things, for a Wall of Allize of Mortdauncester, and in Allize of novel disseisin lyss of them, and a fine may be levied of them. But it hath been doubted, whether Tyths be deuisable by Will: But at another day the matter was moved, and the Court was clear of opinion, that a consultation should be awarded, for whether Withy hath right or not right to these Tyths, Saunders of common right ought to pay his Tyths, and he ought to sever them from the nine parts, and whosoever takes them, whether he hath right to them or no right, Saunders is discharged: But Saunders may prescribe in modo decimandi, without making mention of any severance, and may surmise, that the Tyths do belong to I S, with whom he hath compounded to pay such a sum for all Tyths, and afterwards a consultation was awarded.

Trin. 26. Eiz. in the Kings Bench.

XXX. Stacy and Carters Case.

Stacy brought an Action of Trespass for breaking his Close against Walter Carter, and declared of a Trespass in Somers Land in Tunbridge; The Defendant pleaded, that heretofore he himself brought an Assize of Novel disseisin against the now Plaintiff, and supposed himself to be disseised of his free-hold in Lee juxta Tunbridge, and the Land where the Trespass supposed to be done was put in view to the Recognitors of the said Assize, and further averred, that the Land where, &c. and the Land then put in view is one and the same, &c. upon which there was a Demurrer: Exception was taken to the form of the Demurrer, because in the perclose and conclusion of the Demurrer these words are omitted, Et hoc paratus est verificare. But as to that, it was said by the Court, that the Demurrer was well enough, with or without such Averment in the conclusion of it, which see oftentimes in the Commentaries, &c. and in the book of Entries 146. the greater part of the Demurrs have not any such conclusion. Another Exception was taken to the barre, because the Defendant pleads, that heretofore Walter Carter had brought an Assize against the now Plaintiff, &c. and that the Land put in view to the Recognitors of the Assize per prefatum Warrham Carter, &c. and the Land where, &c. is all one, &c. here is Warrham for Walterium, and notwithstanding that, it was after demurrer, and not after verdict, it was adjudged amendable, and as to the matter of the barre, it was said by the Defendants Council, that recovery of Lands in one Town, by precepe quod reddat, is not a barre for Lands in another Town, but where the recovery is by Assize it is otherwise, for there the Plaintiff is general Sc lib. tento, and the Plaintiff shall recover per visum Juratorum, and the view is the warrant of the Judgment and Execution. And therefore if a recovery in an Assize be pleaded in barre, not comprised, is not any Plea against it, as in the Case of recoveries upon a Precipe quod reddat; but not put in view, and so not comprised, &c. which proves that the Record doth not guide the recovery, but the view of the Jurors. See 26 E 3. 2. Assize brought of Lands in D, the Tenant saith, that he holdeth the said Lands put in view joynly with A, not named in the Will, &c. and sheweth the deed of the Joyn't tenancy, which speaks of Tenements in B, & the plea holdeth good, because he alledgeth the Joyn't tenancy and the Lands put in view: See act. 24 E 3. It was said on the Plaintiff's side, that recovery of Land in Lee juxta Tunbridge could not extend to Lands in Tunbridge, no more then a recovery of Lands in one County can extend to Lands in another County: See 23 E 3. 16. Assize of Novel disseisin brought of Lands in N, the Defendant pleads recovery in Assize, &c. brought before him against the now Plaintiff of Lands in H, and the same Lands put then and now in view, and adjudged no barre. See also 16 E 3. 16. in an Assize of Tenements in W, the Tenant pleads a Recovery of the same Lands against one A by Assize brought of Tenements in C, which was found by the Assize, & that C is a Hamlet of W, and the Plaintiff notwithstanding that recovery so pleaded had Judgement, for a recovery of Lands in one Town shall not be a barre in an Assize of Lands in another Town. See Br. to Judgement, 66 10 E 3. And the whole Court was clear of opinion, that the plea in barre was not good, for in the Assize which is pleaded in barre in the principal Case, the Tenant there, who is now Plaintiff in this Action of Trespass, pleaded Nul tort nec disseisin, which plea, as to the free-hold in Lee juxta Tunbridge, and therefore it cannot be like to the Case which hath been put off, 26 E 3. for there the Tenant pleaded, that he held the said Lands put in view joynly, for there he agreeeth with the Plaintiff in the Lands demanded, the which Lands are put in view,

Averment.

Barre.

viev; but if in the Case at barre the Defendant being Plaintiff in the Aſſize, the now Plaintiff being then Tenant, had pleaded to the Land put in view in barre, and the Plaintiff in the Aſſize had recovered, now in this Action of Trespaſſe the Plaintiff in the Aſſize being Defendant in the Action of Trespaſſe, might well plead this Recovery in barre, for by his plea in the Aſſize he hath tyed himself to the view, and to the Land put in view, but it is not ſo in the Case at Barre, where the Tenant in the Aſſize pleads, nul ſort, nul diſſent, for thers he doth not plead expreſſly to the Land put in view, but to the ſuppoſal of the Plaintiff sc. de libero tenemento in Lee juxta Tunbridge: afterwards Wray, with the aſſent of the other Justices awarded, that the Plaintiff ſhould recover his damages: See by Wray, 44 E 3. 45. in Aſſize of Tenements in B, the Plaintiff pleads, that he himſelf brought an Aſſize of the ſame Tenements, and his plaint was of Tenements in E, and the ſame Tenements put in view, and recovered, and holden a good Plea, be-cause the Tenant hath ſaid, that the ſame Tenements were put in view, and that took by Aſſize, upon which the Plaintiff ſaid, not put in view, and ſo not comprized.

Trin. 26. Eliz. in the Kings Bench.

X X X I. Bencombe and Parkers Case.

In an Action of Trespaſſe the Jury found this ſpecial matter, that the Grandfather of the Plaintiff was feiſed, and made a Feoffment to the uſe of himſelf for life, the remainder to the uſe of John Father of the Plaintiff in tayl, the Grandfather dyed, the Father entred, and by Indenture by wozgs of bargain and ſale, without any words of Dedi & confeſſi, conveyed the Lands to the uſe of A in Fee, and in the ſame Indenture was a Letter of Attorney to make Liberty, which was made accorſingly; and the ſaid A by the ſaid Indenture covenanted, that if the ſaid John ſhould pay before ſuch a day to the ſaid A forty ſhillings, that then the ſaid A and his Heires would ſtand feiſed, &c. to the uſe of the ſaid John and his Heires; and if the ſaid John did not pay, &c. then if the ſaid A did not pay to the ſaid John within four daies after ten pounds, that then the ſaid A and his Heires from thenceforth shall be feiſed to the uſe of the ſaid John and his Heires, &c. and the ſaid John covenanted further, by the ſaid Indenture, to make ſuch further aſſurance as the Council of the ſaid John ſhould advise. Each party failed of payment. John lebyed a Fines to A without any conſideration, it was adjudged upon this matter a good Feoffment well executed by the Liberty, notwithstanding that the words of the conveyance are only by bargain and ſale; and that the Covenant to be feiſed to the new uſes upon payment, and not payment being in one and the ſame deed, ſhould raife the uſe upon the contingency, according to the limitation of it; and Judgement was given for the Plaintiff accord-ingly.

Trin. 25. Eliz. in the Kings Bench.

X X X II. Bedowes Case.

In an Action of Debt upon a Bill ſealed againſt one Bedow; he demands Debt. Dier of the Bill, which was, Memorandum that J John Bedow habe aſ- agreed to pay to R S the Plaintiff twenty pounds, and thereupon there was a Demurrer, firſt, that the deed wanted the wozgs, In cuius rei testimonium, &c. but notwithstanding that the Court held the deed good, and ſaid ſo it was lately

adjudged: Another matter was because the words of the contract are in the preter tense, I have agreed, but notwithstanding that exception the Plaintiff had Judgement to recover, as by Wray, these words, dedi & concessi, according to the Grammaticall sense imply a guift precedent, but yet they are used as words of a present conveyance, and Judgement was given for the Plaintiff.

Pasch. 27. Eliz. In the Common Pleas.

XXXIII. Marsbe and Smith Case.

George Marsh brought a Replevin against Smith and Paget, who make themselves as Bailies to Ralph Bard, and upon the pleading, the Case was, That Sir Francis Askew, was seised of the Mannor of Caftord in his Demesne, as of Fee, which Mannor, did extend unto Dalton, North-kelsey, South-kelsey D and C, and had demesnes and services, parcell of the said Mannor, in each of the said Townes, and so selled, granted, totum manerium suum de North-kelsey in Northkelsay, to the said Bard and his Heires, and granted further, all his Lands, Tenements, and Hereditaments, in North-kelsey, and to that grant, the Tenants in North-kelsey did attorne; And the Land in which the said Distresse was taken is in North-kelsey; the only question in the case was, if, by this grant to Ralph Bard, a Mannor passed, or not: And the case was argued by the Justices; And Periam Justice argued, That upon this grant no Mannor passed, for before the grant, there was no Mannor of North-kelsey, or in North-kelsey, therefore no Mannor can passe, but the Lands and services in North-kelsey shall passe as in grosse, for they were not known by a Mannor, but for parcell of a Mannor: And a Mannor is a thing which cannot be so easily created, for it is an Hereditament which doth consist of many reall things, and incorporated together before time of memory; common reputation cannot be intended of an opinion conceived within three or four years, but of long time; And appendancy cannot be made presently, but by a long tract of time: As an Abbotsone in grosse cannot be made by an Act appendant, and the Queen her selfe by her Letters Patents cannot make a Mannor at this day, a multo fortiori, a subiect cannot; and the Queen cannot by her Letters Patents without an Act of Parliament annex a Mannor to the Duchy of Lancaster, which see 1. Ma. Dyer 95. And where it is usuall, that the Queen doth grant Lands, tenendum de manerio suo de East Greenwich in communis socagio, if upon the death of such a Grantee without heire, the said Land doth revert unto the Queen in point of Escheat, the said Land shall not be parcell of the said Mannor, for the demur was not parcell of the Mannor in truthe, but in reputation: And he cited a case, that the Lord Sturton was seised of the Mannor of Quincamore, and was also seised of the Mannor of Charlton which was holden of the said Mannor of Quincamore; The Lord Sturton was attainted of Felony; and afterwards Queen Mary gave the said Mannor of Quincamore to Sir Walter Mildmay cum suis omnibus juribus & parcellis, it was adjudged that the Mannor of Charlton did passe, for it is now become parcell of the Mannor of Quincamore, and I grant, that things which goe with the Land shall passe well enough: As if the Queen grant to three Coparceners of three Mannors, the liberty of Warden in all the said three Mannors, they afterwards make partition so as each Coparcener hath a Mannor, and the one of them grants her Mannor, the Grantee shall have Warrant: But if the Queen grant a Leet (ut supra) and the Coparceners make Partition, and each of them hath a Mannor, shee shall not have also a Leet, but the Leet which was granted doth remain in common, and there shall not be thore, upon such partition, severall Leets: And also I grant that in the case of two Coparceners of a Mannor, if to each of them upon partition be al-

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lotted demeanes and services, each of them hath a Mannor, for they were compellable to make partition by the common Law being in by descent, See 26. H. 8. 4. 9 E. 4. 5. contrary of Joynt-tenants, for they are in by purchase, and were not compellable by the common Law to make partition, & therefore upon partition betwixt them a Rent cannot be reserved for the equality of the partition: And in every Mannor a Court is requisite for a Court Baron is incident to a Mannor, but a Court cannot at this day be founded or erected, but it ought to be of long time: And in our Case, no Court hath ever been holden in North-kelsey: And if I be seised of the Mannor of B which extends into C and D, and I grant my Mannor of B in D, now a Mannor passeth, and doth extend into D, and the residue which is in C shall remaine in mee in grosse, v. 9. E. 4. 17. Casesby; And if I be seised of a Mannor which doth consist of services, and of twenty Free-holders, and one hundred Acres of Demesnes, and I grant the services of my twenty free-holders, & forty or twenty Acres of the said one hundred Acres, a Mannor shall passe, although it was not granted by the name of a Mannor, but if I grant the services of thre, four, or five of my Free-holders, and forty or twenty of the said one hundred Acres, upon such a grant no Mannor shall passe: Windham Justice contrary, Wee are not here to speak of the creation of a Mannor, that is a forain matter, but we are here to consider upon the division, and apportionment of a Mannor, they that have argued in this case at the Bar, have stood much upon the words of the Conveyance, manerium suum de North-kelsey, and that Sir Fr. Askew at the time of that assurance, had not any Mannor of North-kelsey, or in North-kelsey, but that is not any reason, for if Cestuy que use (meane between the Statute of 1 A. 3. & 27 H. 8.) will make a freement of the Mannor which was in use, by these words, manerium suum, the same had been good, and yet it is not manerium suum, but the Mannor of the Feoffees, but it may be said suum, by procenam of the posits according to the trust and confidence reposed in the Feoffees, so in our case, in as much as Sir Fr. Askew had before this grant alswell demesnes as services in North-kelsey, it may collaterally be said a Mannor there, and notwithstanding that tempore concessionis (proprie loquendo) no Mannor was in North-kelsey, yet now upon operation of the Law, upon this grant a new Mannor shall rise; for in diverse cases where a thing which was not in esse before, upon a grant, may rise: As if I grant unto you out of my Land a Rent de novo; And also a thing which was not in esse before, may upon a grant take upon it a new nature; as if I, seised of a great Wood, grant to you Estovers out of it, they were not before in me but as Woods and Trees, now by this grant they are become Estovers in the Grantee, so as they are in the Grantees in another nature, then they were in mee: So in our case, although North-kelsey was not a Mannor in Sir Francis Askew, yet now upon the grant it is a Mannor in Bard, 9 E. 4. 17. And as to the matter which hath been objected, because a Court cannot now begin, the same is not any reason, for the Court Baron is incident to the Mannor, and also to every part of the Mannor, and transitory through the whole Mannor, and if Sir Francis Askew had sold all the demesnes of the Mannor in Caxford, where the Court Baron for the said Mannor had alwayes been held and not else where, yet such a Court might be holden in any part of the Demeaneas in any other of the said Townes: The Lord Anderson, to the same purpose, it hath been argued of the other side, that the Mannor doth not passe, because the grant is in these words, manerium de North-kelsey, in North-kelsey, I conceive that these words (de North-kelsey) are void, as matter of surpluage, and the grant shall be construed as if the words had been manerium suum in North-kelsey: And a Mannor is such a thing, as may be determined, divided, and suspended: As if the Lord of a Mannor leaseth for years all the Demeaneas of the Mannor, the Mannor is suspended during the terme for

years, as lately it hath been adjudged. And a warranty may be divided, as if a Feoffment in Fee be made to two with warranty, and the one of them releaseth the warranty: vide L 5. E 4. 103. A seised of a Mannor which extendeth in four Towns, B, C, D, and E, and he gives his Mannor in B, C and D by this gift the Mannor and all that is in the said four Towns passeth. And he cited also a Case 21 E 4. 3. The Lord of a Mannor erected a Chappel with, in his said Mannor as a Chappel of Ease, &c. and afterwards it is a Parish-Church, now it is become presentable; an Abbotsom appendant, as the soil upon the which the Church is built is parcel of the Mannor. See 32 H 6. 9. One Mannor may be parcel of another Mannor, as A holdeth of B twenty acres of Land, as of his Mannor of C, which Mannor B holdeth of D, as of his Mannor of E, B dyeth without Heir, so as his Mannor of C is escheated unto D; now the twenty acres are holden of the Mannor of C as they were before, and the Mannor of C is by the Escheat become parcel of the Mannor of B: And by Lease of the Mannor of E it shall passe, and I do not know any difference now between the Case of Parceners, and the Case of Joynsttenants, for now they are both equally compellable to make partition: And he cited the Case of one Eskopp, lately adjudged, viz. the Queen was seised of the Rectory of D, which extended into the Countys of Lincoln and York, and the Queen granted her Rectory of D in Lincoln, these are several grants, and now upon the matter they are become several Rectories. And as to that which hath been objected concerning a Court Baron which ought to belong to this new Mannor, and that such a Court cannot now at this day be erected, and therefore hers cannot be a Mannor; here needs not the erection of any new Court, but soasmuch as the Court Baron before this grant might be by Law holden in any place within the Mannor: therefore every part of the Demesnes of the Mannor is capable of a Court to be holden there. As where one is seised of a Mannor to which an Abbotsom is appendant; now is the Abbotsom appendant not only to the said Mannor but to every part of it, for if he alien an acre, parcel of the Mannor with the Abbotsom, the Abbotsom is now appendant to the said acre: See 43 E 3. 26. So in the Case at Warre, because this liberty and franchise of a Mannor is throughout the whole Mannor, and in every part of the Services and Demesnes, upon this grant of the Services and Demesnes in North-kelsey, and of his Mannor in North-kelsey, a Mannor passeth; which Windham also granted and agreed unto. Note, at this time there were but three Judges in this Court: And afterwards Judgment was given for the Defendant.

P. 27 Eliz. in the Kings Bench, rot. 584.

XXXIV. Alington and Bales Case.

Alington and others Creditors of Sir W Cordel late Master of the Rolls, brought an Action of Debt against Bales: the Case was this, one Breame being seised of certain Lands, by Indenture, bargained and sold the same to one Platte by these words (give, grant, bargain, sell) and by the said Indenture covenanted with Platte, that the said Platte and his Heires should quietly enjoy the said Lands without interruption of any person or persons: And afterwards certain controversies rising betwixt them concerning the said Lands, the said Beame and Platte submitted themselves to the award and arbitrament of Sir W Cordel, to whom they were bounden severally for the performance of such award, the which Sir W amongst other things awarded, that the said Platte and his Heires should enjoy quietly the said Lands, in tam amulo modo & forma, as the said Land is conveyed and assured by the conveyance and assurancse aforesaid: And the truth was, that the said Breame at the time Arbitrament.

of the said Assurance was bounden in a Recognizance of six hundred pounds to one More, 15. Eliz. and afterwards More 16 Eliz. sued a Sci. fac. upon the said Recognizance; and 18 Eliz. the bargain and sale aforesaid was made; and afterwards 19 Eliz. More sued forth Execution by Elegit, and the moyety of the said Land assured to Platte was delivered in Execution to More. And if upon the whole matter the Arbitrament was broken was the question, it was argued by Godfrey, that the Plaintiff ought to be barred, and first, he conceiveth that these words in the Indenture (give and grant) did not help the Action, for the Lands passed with a charge, and the general words Dedi & concessi, do not extend to this collateral charge, but to the direct right of the Land only, but if a stranger had put out the bargain there, upon such general words, an Action would lie, but as the Case is, they do not give any cause of Action, for the Recognizance was a thing in charge at the time of the Assurance: and yet see 31 E 3. Br. Warr. Charta, 33. A enfeoffeth B with warranty, who brings a Warrant in Charta and recovers pro loco & tempore, and afterwards a stranger doth recover against him a Rent charge out of the said Land, and it was holden, that upon the matter B should have execution: the special words of the Arbitrament, upon which the Action is brought, are, that the said Platte and his Heirs should enjoy the said Lands in tam ampl. modo & forma, as it was assured and conveyed to the said Platte; ergo, not in more ample manner: and the the said Land was conveyed to Platte, chargeable to the said Recognizance, therefore if Platte enjoy it charged, there is no cause of Action: And as to the Covenant in the Indenture, that Platte and his Heirs should enjoy quietly the said Lands without interruption of any person, the same is a Collateral Surety; and the words of the Award are, that Platte shall enjoy it in tam ampl. modo & forma, as it is conveyed and assured by the assurance aforesaid without interruption, these are not words of assurance, for the assurance doth consist in the legal words of passing the estate: scil. bargain sale, Dedi concessi, and in the limitation of the estate, and not in the words of the Covenant: And therefore it hath been adjudged, that if I be bounden to A in an Obligation, to assure to him the Mannor of D, &c. if A tender to me an Indenture of bargain and sale, in which are many Covenants, I am not bound upon the peril of my Bond to seal and deliver it. Also here doth not appear any interruption against the Covenant in the Indenture, for here is not any lawful Execution, for it appeareth here, that More hath sued Execution by Elegit. 4. years after the Judgment in the Scire facias, in which case he shall be put to a new Scire facias, for the Sheriff in this Case ought to have returned, that the Conulz after the Recognizance had enfeoffed divers persons, and shewed who, and upon that matter returned, the Conusee should have a Sci. facias against the Feoffees, vide F. N. B. 266. And the Court was clear of opinion against the Plaintiff.

Trin. 27. Eliz. in the Kings Bench.

XXXV. Floud and Sir John Perrotts Case.

Floud recovered against Sir John Perrott, in an Action upon the Case upon a promise, eighty six pounds, against which Floud one Barlow affirmed a Plaintiff of Debt in London, and attached the said money in the hands of the said Sir John, and had execution according to the custom of London. And now the said Floud sued a Scire facias against the said Sir John, who appeared, and pleaded the said Execution by attachment; upon which Floud the Plaintiff did demurre in Law: And it was adjudged no plea, for a duty which accrued by matter of Recoupy cannot be attached by the custom of London. And notwithstanding that the custom of London be layed generally in aliquod debito, and damages recovered are quoddam debitum, as it was urged by the Coun-

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cil of the Defendant: Yet the Law is clear, that Judgements given in the Courts of the King ought not, nor cannot by such particular customs be defeated & avoided, as it was lately adjudged in a Western Case, damages were recovered, the Sheriff by virtue of a Fieri facias levied the money, which one to whom the Plaintiff was indebted, did attach by the custom, in the hands of the Sheriff; but it was adjudged the attachment was not good, for the custom of attachment cannot reach upon a thing of so high a nature as a Record is; the same Law of Debt upon a Recognizance and Statute, &c. and it was affirmed by Wray cheif Justice, that upon great deliberation it was agreed, by Bromley Lord Chancelloz himself, the Lord Anderson, Mead and Periam Justices, that where a Merchant, having in an Action recovered certain damages, became Bankrupt, upon which issued a Commission upon the Statute of 13. Eliz. of Bankrupts, that such Commissioners could not intermeddle with such damages, to dispose of them to the Creditors, according to the said Statute: But now see the Statute of 1 Jacobi. The Commissioners have power to dispose of such debts, &c.

Trinit. 27. Eliz: in the Kings Bench.

XXXVI. sir Walter Hungerfords Case.

Grants of the
King.

Election.

In a Replevin by Sir Walter Hungerford, the Case was this, the Queen being seised of a great Waste called Rudesdown in the Parish of Chipnam, granted to the Mayor and Burgesses of Chipnam, the moiety of a Yard-land in the said Waste, without certainty in what part of the Waste they should have the same, or the special name of the Land, or how it was bounded, and without any certain description of it. And afterwards the Queen granted to the said Sir Walter the said Waste, and afterwards the said Mayor and Burgesses by warrant of Attorney under the Common Seal, authorized one A to enter in the said Waste, and in the behalf of the said Mayor and Burgesses to make election of the said moiety, &c. who did so accordingly. And upon this matter given in evidence the parties did demurre in Law, and the Jury were discharged. And it was holden and resolved by the whole Court, that the grant to the Mayor, &c. was utterly void for the uncertainty of the thing granted: And if a common person do make such a grant it is good enough, and there the Grantee may make his choice where, &c. and by such choice executed, the thing shall be reduced into certainty: which choice the Grantee cannot have against the Queen, which difference was agreed by the whole Court: And it was further holden, that this grant was not only void against the Queen her self, but also against Sir Walter Hungerford her Pattee. It was further holden by the Court, that if a common person had made such a grant, which ought to be reduced to certainty by Election, and the Corporation to whom the grant was made (ut supra) should not make their election by Attorney, but after that they were resolved upon the Land, they should make a special warrant of Attorney, reciting the grant to them, and in which part of the said Waste their grant should take effect, East, West, &c. or by buttals, &c. according to which direction the Attorney is to enter, &c.

Trinit. 27. Eliz. in the Common Pleas.

XXXVII. Watts and Jordens Case.

In a Debt by Watts against Jorden, processe continued until the Defendant was outlawed, and upon the Capias ut lagatum he appeared and pleaded to issue,

issue, which was found for the Plaintiff, and Judgement given accordingly. Error.
And now came Jourden and cast in a Writ of Error, and assigned for Error, that he appeared upon the Capias ut lagatum, and pleaded to issue, the Original being determined, and not revived by Scire facias, upon his Charter of pardon; Anderson Justice was of opinion, that it was not Error, for that the Statute of 18 Eliz. had dispensed with it, being after verdict, for the words of the Statute are, For want of any writ Original or Judicial: Windham Justice contrary, for the Statute doth not extend, but where the Original is imbeselled, but in this Case it is not imbeselled, but in Law determined, and at last the Writ of Error was allowed.

XXXVIII. Trin. 23. Eliz. in the Common Pleas.

The Case was, A seised of Lands by his Will devised, that his Executors should sell his Lands, and dyed, the Executors levy a Fine thereof to one F, taking money for the same of F. If in title made by the Conusee to the Land by the Fine. It be a good plea against the Fine to say, Quod partes ad finem nihil habuerunt, is the question. Anderson conceived that it was; But by Windham and Periam upon Not guilty; The Conusee might help himself by giving the special matter in evidence, in which Case the Conusee shall be adjudged in; not by the Fine, but by the Devise: As by Windham. A deviseeth, that his Executors shall sell a Reversion of certain Lands, of which he dyeth seised; they sell the same without deed, and good; for the Vendee is in by the Devise and not by the conveyance of the Executors: See 19 H 6. 23. And by Periam the Conusee may help himself by pleading, as he who is in by the Feoffment or grant of Cestuy que use by the Statute of 1 R. 3.

Fines levied;

Devise.

Trin. 27. Eliz. in the Common Pleas.

XXXIX. Albany and the Bishop of St. Assaph's Case.

Albany brought a Quare impedit against the Bishop of St. Assaph, who justified for Lapse: The Plaintiff by Replication said, that before the six moneths expired, he presented to the said Bishop one Bagshaw, a Master of Arts and Preacher allowed, &c. The Defendant by way of Rejoyneder said, that the Church upon the presentment to which the Action is brought is a Church with Cure of Soules, and that the parishioners there are homines Wallici, Wallicam loquentes linguam & non aliam. And that the said Bagshaw could not speak or understand the Welch Language, for which cause he refused him, and gave notice to the Plaintiff of such refusal, and of the cause of it, &c. upon which the Plaintiff did demurre in Law. And first it was agreed and resolved by the whole Court, that in the computation of the six moneths in such Cases, the Reckoning ought not to be according to the Calender, January, February, &c. but Secundum numerum singulorum dierum, allowing eight and twenty dayes to every moneth: Walmsley Sergeant argues for the Plaintiff, and he took exception to the Rejoyneder; for in that the Defendant had departed from his Barre, for in the Barre the Defendant intitles himself to the presentment by reason of Lapse, and in the Rejoyneder he confesseth the presentment of the Plaintiff, and pleads his refusal of his Clarke, and shews the cause of it; sc. the want of the Welch Language, which is a Departure; And he cited divers Cases to the same purpose, 27 H 8. 3. In forfeiture of Marriage, the Defendant pleaded the Feoffment of the Ancesto; of the Heir to divers persons, absq; hoc, that he dyed in the homage of the Plaintiff, the Plaintiff by Replication said, that the said Feoffment was made to the use of the said Ancestor and his Heires, the Defendant by Rejoyneder saith; that the

the said Antestor did declare his Will of the said Lands, the same was holden a Departure, for he might have pleased the same in Barre, and 21 H 7. 17, 18, and 37 H 6. 5. in Trespass the Defendant pleaded, that I S was seised of the Land where, &c. being Land deviseable, and devised the same to him and his heirs, the Plaintiff by Replication said, that I S at the time of the devise was within age, &c. The Defendant by Rejoyneder said, that the custom there is, that every one of the age of fifteen years might devise his Lands, &c. the same was holden a departure: But to this Exception the Court took not much regard: But as to the matter in Law, it was argued by Walmesley, that the defect of the Welsh Language assigned by the Defendant in the presence of the Plaintiff is not a sufficient Cause of refusal; for notwithstanding that it be convenient that such a Presentee have the knowledge of such Language, yet by the Law of the Land, ignorance of such Language, where the party h. th more excellent Languages, is not any disability; and therefore we see, that many Bishops in Wales, who haue the principal Cure of Soules, are English-men; and the Welsh Language may easily be learned in a short time by converse with Welsh-men: And the Statute of 1 Eliz which establisheth the Book of Common Prayer, ordaineth, that the said Book of Common Prayer shall be put in use in all the Parish Churches of Eng. and Wa. without any provision there for; the translation of the said Book into the Welsh Language. But afterwards by a private Act it was done, by which it is enacted, That the Bishop of Wales shoulde procure the Epistles and Gospels to be translated, and read in the Welsh Language, which matter our Presentee might do by a Curate well enough: And he conceived, that by divers Statutes, Aliens by the Common Law were capable of Benefices. See the Statute of 7 H 3. Cap. 12. 1 H 5. Cap. 7. 14 H 6. Cap. 6. and before the said last Statute Englishmen were capable of Benefices. Gwyd Herseant contrary: and he confessed, that at the Common Law the defects aforesaid were not any causes of refusal; but now by reason of a private Act made, 5 Eliz. Entituled, An Act made for the translating of the Bible, and of the Divine Service into the Welsh tongue, the same defect is become a good cause of refusal, in which Act the mischeif is recited, viz. That the Inhabitants of Wales did not understand the Language of England, therefore it was Enacted, That the Bishops of Wales shoulde procure so many of the Bibles and Books of Common Prayers to be imprinted in the Welsh Language, as there are Parishes and Cathedral Churches in Wales, and so upon this Statute, this imperfection is become a good cause of refusal. And he likened it to the Case of Coparceners and Joyn't-tenants, who now, because that by the Statute of 32 H 8. Joyn't-tenants are equally capable to make partition as Coparceners were by the Common Law, Now Partition betwixt Joyn't-tenants within age is as strong as betwixt Parceners within age. But as to that payment it was said by the Lord Anderson, that it is very true, that upon the said Statute the want of the Welsh Language in the Presentee is now before a good cause of refusal, but because the said Act being a private Act hath not been pleaded by the Defendant, we ought not to give our Judgment according to that Act, but according to the Common Law. Another matter was moved, because here appeareth no sufficient notice given to the Patron after the said Refusal, for the Plaintiff did present the thirteenth of August (the Church boyding the fourteenth of March before) the nine and twentieth of August the six months expired; the fourth of September the Defendant gave notice to the Patron of the refusal, and the fourteenth of September was the Collation, and it was said by the Lord Anderson, that it appeareth here, that there are two and twenty dayes between the Presentment and the Notice, which is too large a delay: And the Defendant hath not shewed in his Plea any cause for the justifying or excuse of it, and therefore upon his own shewing we adjudge him to be a disturber: See 14 H 7. 21. 15 H 76. and note by Periam, it was adjudged

Judged in the Case of Molineux, if the Patron present, and the Ordinary both refuse, he ought to give notice to the person of the Patron thereof, if he be resident within the County, and if not, at the Church it self which is void.

X L. *Mich. 27. and 28. Eliz. at Serjeants Ione:*

This Case was referred by the Lords of Council to the Justices for their opinions, I S by Indenture between the Queen of the one part, and himself of the other part, reciting that where he is indebted to the Queen in eight hundred pounds, to be paid in four following, twenty pounds at every Feast of St. Michael, until the whole sum aforesaid be paid, covenanted and granted with the said Queen, to convey unto the Lord Treasurer, and Barons of the Exchequer, and to their Heirs, certain Lands to the uses following, viz. to the use of the said I S and his Heirs, until such time as the said I S, his Heirs, Executors or Administrators shall make default in payment of any of the said sums; and after such default, to the use of the said Queen, her Heirs and Successors, until her Heirs and Successors shall have received of the issues and profits thereof such sums of money parcel of the said debt as shall be then behind unpaid, and after the said debt so paid and received, then to the use of the said I S and his Heirs forever. I S leveth a Fine of the said Land to the said Lord Treasurer & the Barons, to the uses aforesaid; & afterwards being seized accordingly, by deed indented and enrolled bargain & sells the said Land to a Stranger: default of payment is made, the Queen seizeth, and granteth it over to one and his Heirs, quousque the money be paid, and after the money is paid: And upon conference of the Judges amongst themselves at Serjeants Inne, they were of opinion, that now I S, against his Indenture of bargain and sale, should have his Lands again, for at the time of the bargain and sale he had an estate in fee, determinable upon a default of payment, ut supra, which accrued to him by the first Indenture and the Fine, which estate only passed by the said Indenture of bargain and sale, and not the new estate which is accrued to him by the latter limitation after the debt paid, for that was not in esse at the time of the bargain and sale; but if the conveyance by bargain and sale had been by Feofement or Fine, then it had been otherwise, for by such conveyance all uses and possibilities had been carried by reason of the forcible operation of it.

Hill. 28. Eliz. In the Kings Bench.

X L I. *Taylor and Moores Case.*

Taylor brought Debt upon an Obligation against Moore, who pleaded in barre, upon which the Plaintiff did demur, and the Court awarded the Plea in Barre good, upon which Judgement the Plaintiff brought a ~~Writ~~ of Error, and assigned Error in this, that the Barre upon which he had demurred, as insufficient, was adjudged good: Upon which now in this writ of Error the Barre was awarded insufficient, and therefore the Judgement reversed: But the Court was in a doubt what Judgment shall be given in the Case, viz. whether the Plaintiff shall recover his debt and damages, as if he had recovered in the first Action, or that he shall be restored to his Action only, &c. And Wray cited the Case in 8 E 4. 8. and the Case of Attaint 18 E 4. 9. And at last it was awarded, that the Plaintiff should recover his debt and damages: See to that purpose 33 H 6. 31. H 7. 12, 20. 7. Eliz. Dyer. 235.

Debt.
Error.

Hill. 28. Eliz. in the Kings Bench.

XLII. Higham and Harewoods Case.

Hyan Ejectione firmæ the Case was, that one Butty was seised of the Land where, &c. and also of a Messuage, with which Messuage the said Land had been usually occupied, time out of mind, &c. and being seised lying sick commanded a Scribner to be brought to him, and the said Scribner being brought to him, he gave him Instructions to make his Will, and amongst other things declared unto him, that his meaning was, that the said Messuage, and all his Lands in Westerly should be sold by his Executors; and the Scribner in making of the Will penned the matter in this manner: I will that my house, with all the appurtenances, shall be sold by my Executors, Butty dyed, the Executors sell forty acres of the said Land to the Defendant; and all this matter was found by special verdict, and it was moved by the Plaintiff's Council, that the sale of this Land by the Executors is not warranted by the Will: Another matter was moved, scil. admitting that the Executors have authority by the Will to sell the Land, if the sale of parcel of the Land be good and warrantable: As if I make a Charter of Feoffment of ten acres, and a Letter of Attorney to make livery of them to the Feoffee, if the Attorney makes several liberies of the several acres the same is void: But by Cook the Cases are not like, so in the Case put he hath a special Commission, in which the party to whom, and all the other circumstances are set down certainly, contrary in the Case at the Barre, there the Commission is general &c. and peradventure the Executors shall never find a Chapman who will contract with them for the whole. And afterwards upon conference amongst the Judges, Clench, Gaudy and Wray, it was resolved, that by this devise the Land do passe by the sale of the Executors to the Defendant, which sale also by process is warranted by the Will, for by Wray, those words, with all the appurtenances are effectual and emphatical words to enforce the devise, and that both extend to all the Lands especially, because it is found, that the Testator gave to the Scribner his Instructions accordingly: And afterwards Judgment was given against the Plaintiff. See 3 Eliz. Plowd. 210. Between Sanders and Freeman, there the Devise is pleaded in this manner. Messuagium cum pertinentiis ad illud spectantibus in perpetuum in villa de Arthingworth.

Trinit. 28. Eliz. in the Kings Bench.

XLIII. Watkins and Astwicks Case.

Hyan Ejectione firmæ, it was found by special verdict, that one Maynard was Seised, and made a Feoffment in fee upon condition of payment of money on the part of the Feoffee by way of Mortgage at a certain day, before which day the said Maynard dyed, his Son and Heir being within age, afterwards at the day of payment limited by the Mortgage, a Stranger at the instance and request of the Mother of the Heir tendered the money to the Mortgagee in the name of the Heir being within age, who refused it. And it was resolved by the whole Court, that the same is not a sufficient tender to redeem the Land, according to the Mortgagee, for it is found by the Jury, that the Heir at the time of the tender was within age, generally, not particularly of six or ten years, &c. then it might well stand with the verdict, that the Heir at such time was of the age of eighteen or nineteen years, at which age he is by the Law out of the Ward of his Mother, or any other prochin amy, in which Case

Case it is presumed in Law, that he hath discretion to govern his own affairs : and in this Case the Mother is but a stranger, for the Law hath estranged the Mother from the government of the Heir ; but if the Jury had found that the Heir at the time of the ~~Under~~ was of tender age, viz. within the age of fourteen years, in which Case by Law he ought to be in Ward, in such Case the tender had been good.

Trin. 28. Mz. in the Kings Bench.

X L I V. Lepur and Wroths Case.

A Replevin by Lepur against Wroth ; and declared upon a tortious taking Replevin. in Burnham in the County of Essex ; the Case upon the pleading was, that Robert Earl of Sussex was seised of the Manor of Burnham in Fee, and leased the same to the King for one and twenty years, and afterwards the said Earl died, by which the said Manor descended to Thomas late Earl of Sussex, and he being seised : 4 and 5 Phil. and Mary it was Enacted by Parliament, That the Lady Frances, Wife of the said Earl, by virtue of the said Act of Parliament shoulde have, hold and enjoy, &c. during the widowhood of the said Frances, for and in consideration of the Joynture of the said Frances the said Manor : Provided alwayes, and it is further enacted, That it shoulde be lawfull for the said Earl, by his writing indented, dimensionem vel dimensiones facere pro termino 21. annorum vel infra de eodem Manerio pro aliquo redditu annuali, it quod super omnes & singulos hujusmodi dimensionem & dimensiones antiquis redditus & consuetus vel eo major & amplior reservaretur, and that every such demise shoulde be of force, and effectual in Law against the said Frances for term of her life, if the said term shoulde so long continue : And further the said Act gave to the said Frances, Distress, Abovity, Covenant, &c. against such Lessee, and so the said Lessee against the said Dame ; And afterwards the said Thomas, the said former Lease not expired, leased the said Manor to Wroth the Defendant for one and twenty years, to begin at the Feast of Saint Michael next following (and note the Lease was made the third of April he, soe) rending three hundred and forty pounds per annum, which was redditus amplior antiquo & usuali. Popham Attorney general argued, that the said Lease did not bind the said Lady Frances, and that for two Causes : 1. because it is to begin at a day to come : 2. because it was made, 1 former Lease being in esse, and he argued much upon construction of Statutes to be made not according to the letter, but according to the meaning of them : And he cited a Case upon the Statute of 2 H 5. 3. by which it is Enacted, that in no Action in which the damages do amount to forty marks, any person shoulde be admitted to passe in tryall of it, who had not Lands or Tenements of the cleare yearly value of forty shillings, yet the said Statute shall not be by construction extended, where in an Action between an Englishman and an Alien, the Alien payeth medietatem lingua ; and yet the Statute is general : So in our Case, although this private Act doth not seem to provide expressly but for two things : 1. the number of the years, 21. & non ultra : 2. antiquis redditus vel eo amplior, yet in reason and good understanding we ought to think, that the intent of the Act was, that the said Manor shoulde now come to the said Lady Frances surcharged with Leases in Reversion, or to begin at a day to come, for if by this Act the said Earl might make a Lease to begin three moneths after, by the same reason he might make a Lease to begin twenty years after, and also to begin after his death. It hath been objected, that the Lord Treasurer had a Commission to make Leases of the Queens Lands, and that by virtue thereof, he made Leases in Reversion : I know the contrary to that, for every such Lease is allowed by a Bill assinged, and not by the ordinary Commission aforesaid,

Construction
of Statutes.

Leased.

Laws, the words of our Act are, *Demissiones facere pro termino et annorum,*
 that shall be meant to begin presently: As if I lease to you my Lands for one
 and twenty years, it shall be intended to begin presently; and he cited the Case
 betwixt Foxe and Collier upon the Statute of 1 Eliz. concerning Leases made
 by Bish[ops]: That four years of a former Lease being in being, the Bishop leas-
 ed for one and twenty years, the same was a good lease, notwithstanding the
 former lease, for the lease began presently betwixt the parties. And it hath
 been adjudged, that a lease for yeares by a Bishop, to begin at a day to come, is
 utterly void. And he cited the Case of the late Marquess of Northampton,
 who by such an Act of Parliament as ours was enabled to make leases of the
 Lands of his Wife for one and twenty years, and of the said Lands an ancient
 lease was made before the said Act, which was in esse, and before the expira-
 tion thereof, he made a lease by virtue of the said Act to commence after the ex-
 piration of the former lease, and that lease was allowed to be a good lease, war-
 ranted by the said Statute, because that the first lease, which was in esse, was
 not made by force of the said Act, but if the said former lease had been
 made by virtue of the said Statute, the second lease had been utterly
 void.

XL V. Trin. 28. Eliz. in the Kings Bench.

Copy-holder.

Surrender by
Attorney not
good.

A Copy-holder of the Manor of the Earl of Arundel did surrender his
 Customary Lands to the use of his last Will, and thereby devised the
 Lands to his youngest Son and his Heires and dyed, the youngest Son being
 in prison makes a Letter of Attorney to one to be admitted to the Land in the
 Exchequer Court in his room, and also after admittance to surrender the same to
 the use of B and his Heirs, to whom he had sold it for the payment of his
 debts: And Wray was of opinion, that it was a good surrender by Attorney;
 but Gaudy and Clench contrary: and by Gaudy; If he who ought to sur-
 render cannot come in Court to surrender in person, the Lord of the Manors
 may appoint a special Steward to go to the prison and take the surrender, &c.
 and by Clench; Lessee for years cannot surrender by Attorney, but he may
 make a deed purporting a surrender, and a letter of Attorney to another to de-
 liver it.

Trin. 28. Eliz. in the Kings Bench.

XL VI. Troublefield and Troublefields Case.

Entry.

The Tale was, that a Copy-holder did surrender to the use of his Will,
 Land thereby devised the Land to his Wife for life, the remainder over-
 to his son in tail, and dyed, the Wife entred, and dyed, a Stranger did intrude
 upon the Lands, and thereof made three several Freedoms to three several
 persons, he in the Remainder entered upon one of the said three Freedoms in the
 name of all the Lands so devised, and made a lease of the whole Land: And
 by Clench and Wray it was a good Entry for the whole, and by consequence, a
 good lease of the whole, Gaudy contrary: Note, all the Lands were in one
 County: See 16 Eliz. Dyer 337. 9 H 7. 25.

Trin.

Trin. 28. Eliz. in the Kings Bench.

X L V I I . Parmort and Griffina's Case.

In a Debt upon an Obligation by Parmort against Griffina a Merchant Debtor, the Defendant pleaded, that the Obligation was made upon condition for the performance of certain Covenants contained within certain Indentures, and shewed what, &c. and alledged further, that in the said Indenture there is a proviso, that if aliqua lis, vel controversia oriatur impostorum, by reason of any clause, article, or other agreement in the said Indenture contained, that then, before any suit thereupon attempted, the parties shall choose four indifferent persons for the ending thereof, whith being done, the Indenture and Obligation shall be void: And in fact saith, that Lis & controversia, upon which the Action is brought, groweth upon the said Indenture, upon which there was a demurrer in Law. And because the Defendant hath not shewed specially upon what controversie or strife, and upon what article certain: The Court was clear of opinion, that the barre was not good: And also the Court was of opinion, that the said Proviso did not extend to subject and submit the breach of every Covenant or Article within the said Indenture to the Arbitrament of the said four persons, but only where strife and controversie both arise upon the construction of any Covenant, &c. within the said Indenture; so as the Defendant ought to have shewed such matter which fell within the Arbitrament, by the meaning of the said Indenture; and Judgment was given against the Defendant.

Mich. : 8. and 29. Eliz. in the Common Pleas.

X L V I I I . Partridge and Partridges Case.

In a Dower by Partridge against Partridge, the Case was, that Land was given to the Father for life, the reversion to his Son and Heir for life, the remainder to the right Heirs of the body of the Father: The Father and Son joyn in a feoffment to the Uncle in Fee, scil. to the Brother of the Father. The Uncle takes a Wife, the Father dyeth, the Son being his Heir in tail, the Uncle dyeth without issue, so as the Land descendeth to the Son, as Heir to his Uncle, against whom the Wife of the Uncle brought Dower: It was moved, if the Son being Heir in tail to his Father, and Heir also to his Uncle, for the Fee descended, be now remitted: so then no Dower attrently to the Wife of the Uncle, for the estate of which she demands Dower is gone: but if the liberty in which the Son joyned with his Father be the liberty of the Son, the same lyeth in his way in the impediment and preventing of the Remitter, so as during his life he shall be adjudged seised of the Lands in Fee, simple by descent from his Uncle: Then Dower lyeth, for the same estate is inherited, of which the Wife demandeth her Dower: And the Court doubted, if it were the liberty of the Son or not. And note, that the Feoffment was without deed. See Dyer 16 Eliz. 339.

Mich. 28. and 29. Eliz. in the Exchequer.

X L I X . The Queen against the Lord Vaux and others.

A Bill of Intrusion was brought for the Queen against the Lord Vaux, Rich. Vaux, and Hen. Vaux, supposing to have intruded into the Rectory Intrusion. and

and Parsonage of Ethelborough in the County of Northampton, and shewed that in the time of Hen. the fourth, the Colledge of Saint Peter of Ethelborough was founded at Westminster, in the County of Midd. by the name, Decani & capituli, and shewed further, that the Rectory of Ethelborough, was appropriated to the said Colledge, and that afterwards by the Statute of 1. E. 6. the said Colledge was dissolved, and the said Rectory, amongst other possessions of the said Colledge, came to the hands of the King, and that the Defendants, 1. Eliz. intruded into the said Rectory, and took one thousand Sheep, one thousand Calves, and one thousand Lambs of Coze, bona & catalla dicta Dominæ Reginæ provenientia ex decimis rectoris predict. apud Westm. predict. The Defendants pleaded, &c. That the said Colledge of Ethelborough was founded in Ethelborough, &c. per nomen Decani, canicorum, & fratum, &c. who leased the said Rectory so appropriated to one Clark for forty six years, in Anno 30. H. 8. who assigned the same to the Defendants, by force of which they justified the taking at Ethelborough, absque hoc, that the said Colledge of Saint Peter in Ethelborough, was founded, per nomen Decani and capituli Ecclesie Sancti Petri de Ethelborough, at Westminster aforesaid, & absque hoc, that they took the said Sheep, &c. at Westminster, &c. Upon which the Queens Attorney did demur in Law. Manwood chief Baron argued, that Judgement ought to be given for the Queen: Exception hath been taken to the Information, because mention is made in it of a Colledge, and it is not shewed what person was the Founder; And also an appropriation is alledged of the Rectory aforesaid to the said Colledge, and the Appropriation is not shewed certain, who was Patron, Ordinary, &c. as to that he argued, that the allegending of the Appropriation and foundation, is but matter of surplusage, and therefore the insufficiency of allegend the same shall not prejudice the Queen, for it had been sufficient to say, That the said Colledge of St. Peter, was seised of the Rectory aforesaid; and then to shew, the Statute of Chauncies, 1 E. 6. and the same is a good title for the Queen. The possession of the Colledge, and the Dissolution of it by the Statute: For this Bill of intrusion is but in the Nature of a possessory action, as an action of Trespass, in which case it is sufficient to make title to the possession only, without relying upon the right, but as to the curios and exact pleading of an appropriation, or a foundation, it needs not in this case, for admit that the Colledge were not well and duly founded, yet such pleading is sufficient, for a Colledge in Reputation is within the Statute of 1. E. 6. and where the party claimes by or under such Foundation, there Foundation ought to be certainly shewed not precisely, but conveniently, not as we plead a common Recovery, but as we plead the creation of a Bishop, scil. debito modo praefectus, without shewing the particulars of the creation; so if an Abbot will plead in discharge of his House of a Rectory, he ought to shew the Foundation, and convenient certainty, which see L. 5. E. 4. 118. Robert Milam founded the Abby of Leicester, and conveyed the right of the Patronage and foundership to the King by Attainder, and the same was good pleading, without shewing the particulars of the Foundation specially, so 3 H. 7. 6. in the Case of the Priory of Norwich, the pleading is, quod Prioratus de Norwich est de fundatione Episcoporum Norwich, for in such case, refert quis sit Fundor, so the King be not Founder; but in our case, non refert quis sit Fundor, for whosoever be Founder, whether the King, or a Subject, all is one, the Statute in both Cases, gives the possessions to the King: And as to the case of Appropriation, the pleading thereof is well, if it be conveniently shewed in case where the party who shewes it, claimes by such Appropriation, as 6. H. 7. 14. 11. H. 7. 8. Concurrentibus his qui de jure, &c. without shewing the particulars of the Appropriation. Now in our case, the Queen is merely a stranger to this Appropriation, and she doth not claime by it, but the possession of the Colledge is the title of the Queen, by the Statute of 1. E. 6. and therefore it

Foundation.

Colledge in Reputation.

General pleading.

it sufficeth, for the Queen to shew that the Colledge was seized, &c. without making mention of the manner of the Appropriation : And as to the traverse of the County, he conceived, that the County is not traversable in this case, for when the tythes are severed from the nine parts, they are presently vested in the party who hath right, and they are things transitory, and also the taking of them, for the party may take them in any place as well as in his own Parish, scil. as well at Westminster, where the Queen supposeth the taking, as at Ethelborough where the Defendant doth justify, &c. and in such cases the place where is not traversable, See 9 H. 6. 62, 63. by Babbington, 35. H. 6. 5. In Trespass of Goods taken in the Parish of Saint Clements, in the County of Midd. the Defendant did justify by buying in open Market in the County of Essex, there needs no traverse, for the Defendant hath made title by an open Market, 34. H. b. 15. 16. In Trespass of Battery at D in the County of Essex, the Defendant pleaded, that the Plaintiff made an assault upon him at B in the County of Kent, and the Defendant fled, and the Plaintiff pursued him continually unto D aforesaid, at which place the Defendant did defend himself, and so the hurt which the Plaintiff had was of his owne assault, and demanded Indgement if Action, the same is a good Plea without traversing of the County, for a Battery may be continued from one County to another. And it was observed by Manwood in citing of that case, that al- though, *prima facie* mirum videri potest that a Battery may be continued from Essex into Kent, because the River of Thames is betwixt them, and yet, re intellectu, it is plain, for one parcell of Land containing thirty Acres of Lands of the Coasts of Essex is within the County of Kent, see also 34. H. 6. 5. by Prisoit, In trespass of Goods taken at Coventry, the Defendant doth justify the taking because the Plaintiff gave the said Goods to the Defendant at London, by force of which he took them at London, absque hoc, that he took them at Coventry, and that traverse not holden good for the Defendant by such a gift might justifie the taking of the Goods in any place as well as in the place where the gift was made, but if in such case, the Defendant had pleaded, that the Plaintiff delivered the said goods to him at London to deliver them over to A, by force of which he took them at London, and delivered them over accordingly, in such Cases the Defendant may well traverse the place supposed by the Declaration, for by his Plea he hath confessed an immediate delivery of the said goods to him by the Plaintiff, and the delivery and the taking all at one time and at one place, and it had not been a good plea for the Defendant to say, that the Plaintiff deli- vered to him the said goods at London, by force of which he took them at Co- ventry, for the possession is confessed by the first delivery of the goods at Lon- don; & the supposal of the Plaintiff of a taking in Coventry, and the justifica- tion of the Defendant of a taking by reason of a delivery at London, cannot stand together. But if the Defendant plead, that the Plaintiff gave to him the goods at London, by force of which he took them there, there he may take a traverse to the place supposed by the Declaration, for by the gift it is lawful to the Defendant to take the goods in any place. So see 19 H. 6. 35. In false Imprisonment supposed in the County of W, the Defendant doth justify as Sheriff of the County of B, by force of a Writ to him directed to attach the Plaintiff, and so he attached him and imprisoned him at C in the said County of B, there the Defendant traversed the County supposed by the Declaration, for otherwise he doth not meet with the Plaintiff, and the authority of the De- fendant doth not extend to the County supposed by the Declaration. See also to the same purpose 22 E. 4. 39. by Hussey, where the difference is taken when justification is by reason of a Warrant to take goods in any place whatsoever, and where in a place certain, as to the traverse of the foundation, ab^q hoc, quod predictum Collegium Fundatum fuit per nomen Decani, & Ca- pituli Ecclesiae collegiate Sancti Petri de Ethelborough apud Westm. he hath here

here traversed that which was not alledged, for the placing of the last words of the traverse, scil. apud Westmest. in the end of the traverse seems by common construction to be intended thereby, that there is no such Colledge at Westm. and not that the Colledge was not founded at Westm. soz then the traverse shoud be, absque hoc, quod collegium predictum fundatum fuit, at Westminster, per nomen, &c. But the most proper traverse, that the Defendant could have taken in this case had been, absque hoc, quod Decanus & Capitulum Ecclesie collegiat. de Echelborough was seised, soz the corporation mentioned in the Will, and that which is mentioned in the War, are not all one, but differ in this manner, scil. in the Will the Dean and Chapter, &c. in the War the Dean, Canons, and Brethren, and perhaps there are two such Corporations, and then both cannot be seised, and therefore upon the seisin of one of them, the traverse shall be taken: And afterwards Judgement was given soz the Queen.

Mich. 28. and 29. Eliz. In the Common Pleas.

L. The Queen, against the Bishop of London, and Scot.

Quare impedit. **T**he Queen brought a Quare impedit against the Bishop of Londen, and Scot, and the Case was, that A seised of an Abbouison in grosse, holden of the Queen in cheif, aliened the same by Fine without Licence; the Church became void, the Conusee presented; The Queen without office sound, brought a Quare impedit, the question was, if the Queen without office sound shoud present; And it was argued by the whole Court, that if the Alienation had been by deed only, that there the Queen without office sound shoud not have had the presentment, soz upon such an Alienation by matter in fact, without Licence no Scire facias should issue without office sound of the Alienation, but upon an Alienation without Licence by matter of Record, a Scire facias lyeth before office, which was granted by the whole Court: And in the last case the Queen shal have the meane profits from the time of the Scire facias returned, but in the first case from the time of the office sound, *sic* soz that Stamford Prerogative, fol. last but one, 8 E. 44. It was also moved, if the Queen intituled to the presentment as above, pardoneth to the Conusee all Alienations without Licence, and Intrusions, if the estate of the Incumbent be thereby confirmed, but the Court would not argue that point, but it was adjourned untill another day.

Mich. 28. & 29. Eliz. In the common Pleas.

L. I. Braybrooks Case.

Fines levied. **T**he Case of one Braybrook was moved, which was, Land was given to A for life, the Remainder to B for life, the Remainder to the said Braybrook in Fee: B being in possession leyyed a Fine to a stranger, sur conusans de droit come ceo, &c. A dyed, if now Braybrook might enter forz the forfeiture, was the question: And it was agreed by the whole Court, that by that Fine the Remainder in Fee is not touched, ex discontinued, but because B had done as much as in him lay for the disposing of Fee simple by the Fine, and hath taken that upon him, the same amounts to a forfeiture: And it was also agreed by Anderson and Periam, that if Tenant for life in possession leyyeth a Fine, &c. if the Lessor doth not enter within five years after he shall be bounden: Windham contrary, soz by him it is in the election of the Lessor to re-enter immediatly forz the forfeiture, or to expect the death of the Lessor.

Mich.

Mich. 28. & 29. Eliz. In the Exchequer Chamber.

L I I. *Willshalge and Davidges Case.*

W illshalge brought Error in the Exchequer Chamber, upon the Statute of 27. Eliz. Cap. 8. against Davidge, upon a Judgement given in the Kings Bench, Hill. 28. Eliz. and assigned for Error, that where Davidge had heretofore brought Debt against the now Plaintiff, and declared upon diverse Contracts, scil. that he had sold to Willshalge such Merchandizes for so many Portagues, and such Merchandizes for so many Ducats, which in toto amounted to seven hundred pounds Sterling, which sum he demanded, scil. in Sterling money, and not in Ducats and Portagues, according to the Contract; And upon the Declaration the said Willshalge had demurred in Law, and the Court gave Judgement for the Plaintiff, for it is in his election to divide his debt in which of those Coynes he pleased, either in the proper coyne of the Contract, or of Sterling, scil. in currant money. And afterwards the said Judgment was affirmed.

Mich. 28. & 29. Eliz. In the Exchequer.

L I I I. *Henly and Broads Case.*

H enly brought Trespass against Broad in the Kings Bench, and declared, Trespass. That the said Defendant, simul cum quodam 1 S. clausum suum fregit, &c. The Defendant pleaded to Issue, and it was found for the Plaintiff, and it was objected in Day of Judgement, that the count was not good, for it appeareth therein, upon the shewing of the Plaintiff himselfe, that the Action ought to be brought against another also, not named in the Bill, and because the same appears of the Plaintiffs own shewing, the Declaration was not good, and notwithstanding that said Exception, Judgement was given for the Plaintiff. Upon which Broad brought a Bill of Error, and assigned the same matter for Error; And there the Case of 2 H. 7. 16. 17. was cited, Counts. where a difference is taken, where the Plaintiff declares, that the Defendant with one B did the Trespass, him naming in certain, and where the Declaration is, that the Defendant, cum quibusdam aliis ignotis, &c. vi. 8. H. 5. 5. And at length all the Justices of the common Pleas, and Barons of the Exchequer were clear of opinion, that by the common Law the Declaration was not good, for the reason, and upon the difference aforesaid: but if in Trespass against one, who pleads that the Trespass was done by himselfe and one B, to whom the Plaintiff hath released, and the Plaintiff traverse the Release, in that case, for as much as the matter doth not appear upon the Plaintiffs own shewing, but comes in on the part of the Defendant, and not denied by him, the Declaration is good enough: And it was further agreed by them all, that now this defect after Verdict is helped by the Statute of 18. Eliz. for it doth not concerne substance but only forme: And afterwards the first Judgement was affirmed.

Mich. 28. & 29. Eliz. In the Common Pleas.

L I V. *Wood and Fosters Case.*

Replevin.

Wood brought a Replevin against Humfrey Foster and others; and made his plaint of the taking of one thousand Cattel; Foster pleaded, Non cepit; and the others, that the property was in another; upon which matters they were at issue. And as unto the first issue, the Case upon the Evidence was: that at the late Lord Windsor was possessed of certain Sheep, and by his Will devised them unto Eliz. his Daughter for her advancement in marriage, and of his Will made his Executrix, and dyed, his Wife took to her Husband one Puttenham, who being thus possessed leased the said Sheep with a Farm for eleven years by Indenture, upon which it was agreed between the said parties, that the Lessee should keep so much of the Rent reserved upon the said Lease, to buy therewith so many Cattel over, so as the whole Stock of the said Sheep upon the said Farm should amount to the number of one thousand Cattel; and the Lessee also covenanted to yield and render to the said Puttenham at the end of the said Term one thousand Sheep between two years shozne, and four years shozne. Afterwards Puttenham by his deed gave unto one A., who had married the said Eliz. the said one thousand Cattel, to have them after the said Term; the Term expired; Puttenham sold and granted them unto Wood, who brought them away with him. And the said A. pretending that the said Sheep passed to him by the said grant of Puttenham during the said Term, seized them, and the same was nochtur as they were driven in the high-way, unde magna contentio orta fuit between the said parties, the one charging the other with sellony, whereupon the Constable of the Town where, &c. supposing the said matter would grow to an Outrage, seized the said Cattel as felonys goods, and afterwards went to the house of the said Foster, which was near unto the high-way, and asked his advise upon the matter, but he would not meddle therewith: Afterwards one Perkins, who had bought the said Cattel of the said A., came to Foster, and shewed to him, that the high-ways there were not sufficient for pasture of the said Cattel until the said controversy be determined, and prayed that the Cattel be delivered to him the said Perkins to keep in the mean time, to whom Foster answered, that if the said Perkins would find sufficient sureties to deliver back the Cattel to him who had right, that he would be content the said Perkins should take them; whereupon the said Perkins was bound to Foster to that purpose, and took away with him the said Cattel. And it was also given in Evidence, that the servants of the said Foster had seized the Cattel for the use of their Master. And by the clear opinion of the Court upon the whole matter shewed, Foster, Non cepit, and according to such direction of the Court the Jury found, that Foster, non Cepit; and as to the matter of property, the Court was clear of opinion, that the grant made by Puttenham of the said Cattel, during the Term, was utterly void, & that Puttenham during the same Term had not in the said Cattel either a general or a special property, nor also after the Term, but if after the Term expired, the Lessee will not according to his covenant deliver to Puttenham one thousand Sheep then Puttenham is put to his Action of covenant, for here the Lessee was bound to deliver to Puttenham at the end of the Term, not the same Cattel which were leased, but such a number of Sheep, and the same ought to be between two years shozne, and four years shozne, which could not be the Sheep demised, for they did exceed such degree before the end of the said term, and then the grant of Puttenham during the Term is merely void: And then when after the Term, the Lessee, according to the covenant, delivered to Wood one thousand Sheep, he might well sell them to the Plaintiff; And such was

the

the opinion of the whole Court, and it was said by Justice Windham, that if I let certain Sheep to one for two years, now upon that Lease somewhat remains in me, but that cannot be properly said a Property, but rather the possibility of a Property which cannot be granted over. See 11 H 4. 177. 178. 22 E 4. 10. 11. In the same plea it was also holden, that in a Replevin where the plaint is of one thousand Beasts, and the Defendant justifies by reason of property, upon which the parties are at issue; Now upon the Evidence the Defendant may surmise a lesser number of Beasts, and drive the Plaintiff to prove a greater number then that which the Defendant hath confessed upon the Evidence. Notwithstanding that the number set down in the plaint be by the plea of the Defendant quodum modo admitted, and the lesser number surmised, and the contrary not proved shall go in mitigation of the damages, and the Jury shall conform their verdict in the right of damages, according to the proof of the number, notwithstanding that the number set forth in the plaint be not by the Plea denied by the Defendant, and so it was put in ure in this Case: for the Plaintiff was of the taking of one thousand Cattel, but the proof extended but to eight hundred sixty five. Note also in the same Plea it was holden, that whereas one Chock was returned upon several Juries in two several Courts at Westminster, and both the Juries are adjourned to one day, now in which of the said two Courts the said Chock was sworn, he shall be discharged of his attendance at the other Court the same day.

Mich. 28. and 29. Eliz. in the Common Pleas.

L V. Carters Case.

After brought an Action upon the Case against I S, and declared, that A was possessed of certain Lands for years, the Inheritance thereof being in the wife of the Plaintiff, upon which Lease a Rent was referred: The Defendant, in consideration that the Plaintiff would procure the said A to assign the said Lease to the Defendant, promised to pay the said Rent to the Plaintiff for all the residue of the Term. It was objected, that upon this matter the Action doth not lie, because that the Plaintiff hath a higher remedy scil. an Action of Debt or Distresse; but the opinion of the whole Court was, that the Action did lie, for here upon the promise an Action is given to the Husband alone in his own right, whereas the Rent is due to the Husband in the right of his wife in its nature, and the Rent is also to be paid by the Land; But upon this Assumption it is payable to the person of the Husband. And afterwards Judgement was given for the Plaintiff.

Mich. 28. &c 29. Eliz. In the common Pleas.

L V I. Kimpton, and Bellamy's Case.

George Kimpton brought a Replevin against Wood and Bellamy, who make Conualce as Baylies to George Burgoin for Damage Feasance, the Plaintiff in Bar of the Conualce, sheweth, That he himselfe, and all those whose estate he hath in one hundred and forty Acres of Land, time out of mind, &c. haue had common for all manner of Cattell in six Acres of Land wherof the place where, &c. is parcel, and so put in his Cattell, &c. against which, the Defendants say, that the Plaintiff, &c. had common in forty Acres of Land, whereof the said six Acres are parcel, all lying in Communi campo, and that the Plaintiff, a long time before the taking, had purchased two Acres parcel of the said forty Acres, &c. upon which there was a demurrer in Law;

It was argued by Serjeant Shuttleworth, that the Replication to the Writ to the Abouy is not good, for in the Bar to the Abouy, the Plaintiff hath shewed, that he hath common in six Acres, and the same shall be intended common in the six acres only, for common in forty acres cannot be the common in six acres; as 35 H 6. 38. In Debt for Rent reserved upon a Lease for years, the Plaintiff declared that he leased to the Defendant ten acres of Land, rendering the Rent in demand, the Defendant pleaded, that the Plaintiff leased to him the said ten acres, and also such a Rectory, rendering the same Rent, the same is no plea without traverse, abique hoc, that he leased the ten acres only: See Dyer 29 H 8. 32. And the whole Court was clear of opinion, that for want of such traverse, the plea is not good, for by Periam the Common supposed in the barre to the Commons out of the six acres, cannot be intended the Common supposed in the Replication, scil. out of the forty acres. And by him, If in Trespass the Defendant Justifie by reason of common in six acres of Land, upon which the parties are at issue; and the Defendant in Evidence sheweth, that he hath common in forty acres, whereof the said six acres parcel, the same doth not maintain his title, but the issue shall be found against him: But by the Lord Anderson, because that this Demurrer is general, the other party shall not take advantage of that defect of pleading, for the want of the Traverse, and that by reason of the Statute of 27 Eliz. For Traverse is but matter of form, and the want of the same shall not prejudice the other party in point of Judgement, but the Judges ought to judge upon the substance, and not upon the manner and form of the pleading: And as to the matter of the Common, the Court was clear of opinion, that by the purchase of the said two acres, the whole Common was gone.

Extinguish-
ment.

Mich. 28, and 29. Eliz. in the Common Pleas.

L VII. Knights Case.

Debt.

Abatement of
Writ.

KNIGHT brought Debt against three Executors, and now surmised by his Council, that one of the Executors is dead, pendant the Writ; and pray on the opinion of the Court, if the Writ should thereby abate or not, for by some it is not like where a Writ is brought against two Executors, for there is any of them dyeth, pendant the Writ, it shall abate, for now the plural number is gone, for there is now but one Executor, but in our Case the plural number continues: But notwithstanding that, the Court was clear of opinion, that the Writ should abate: Wherefore the Plaintiff seeing the opinion of the Court, prayed that upon his surmise aforesaid, he might have a new Writ by Journeys Accounts, which was granted to him.

Mich. 28, and 29. Eliz. in the Common Pleas.

The Queen and Middletons Case.

Quare Imped.

THE Queen brought a Quare Impedit against Middleton, and counter, that W Lord Say was seised of the Manors of Beddington in the County of Hertford, to which Manors the abbey of the Church was appendant, & ad Ecclesiam predict. presentavit Coo Clericum suum, and afterwards dyed seised, having issue two Daughters, Mary married to the Earl of Essex and Ann to the Lord Mountjoy, who make partition, and the said Manors of Beddington, inter alia, was allotted to the said Mary for her part; and afterwards the said Earl and Mary dyed, having issue Ann, who took to Husband the Marquess of Northampton, and afterwards 33 H 8. a Fine was levied of the

the said Pannoz inter &c. Querent. and the said Marquess and Ann Dessoys, tenants, by which Fine the said Pannoz was granted and rendered to the said Marquess for term of his life, the remainder to the said Ann his wife in tayl, the remainder over to Hen. the eighth in Fee; the Marquess is attainted of High Treason, by which the King seizes, and afterwards Ann dyed without issue, after which in the seisin of the Queen that now is the Church voided, by which it belonged to the Queen to present; The Defendant did confess the seisin of the Lord Say, and the whole matter contained in the Count until the Attainder; and pleaded further, that after the said Attainder Queen Mary leased the said Pannoz with the advowson to Rochester and Walgrave for forty years, if the said Marquess should so long live, who were possessed accordingly, and in their possession the Church became void, to which Abundance one Twinko did present the Defendant, who upon his presentment was instituted and inducted: Upon which Plea the Queens Serjeant did demur in Law. It was argued by Serjeant Shuteworth for the Queen, That the counter-pleading of the title of the Queen by the Incumbent, without shewing title in his own Patron could not be good, notwithstanding the Statute of 25 E 3. Cap. 7. before which Statute, the Incumbent could not plead any matter which went to the right of the Patronage, but only in discharge or excuse of the disturbance, and therefore we ought to observe the words of the said Statute, sc. the possessor shall be received to counter-plead the Kings title, and to have his Answer, and to defend his Right upon the matter, although he claim nothing in the Patronage; upon all which words taken together it appears, that the Incumbent ought not only counter-plead the title of the King, but also ought to shew and defend his own right, and that hath not the Defendant done here; For Twinko, of whose presentment he is in the Church, doth not claim under the lease made by Queen Mary to Rochester and Walgrave, but during their said Lease and their possession of it, by usurpation presented the Defendant, 45 E 3. 13. by Finchden: The King brought a Scire facias upon a Recovery in a Quare Impedit, the Defendant being Incumbent pleaded, that after the said Indgement the King had presented to the said Church 1 S his Clark, who was admitted accordingly; and exception was taken because the Defendant did not shew a title in himself to maintain his possession, but it was not allowed; for a difference is taken betwixt a Plea where in in a Quare Impedit, and a Plea in a Scire facias, for in a Scire facias it is sufficient pleading the intent to extort the Plaintiff of execution without any title, contrary in a Quare impedit: And it is a general Rule, that in all Cases where an Office is to be traversed, none shall be received to traverse the title of the King, without making a title to himself, which see 38 E 3. 18. So in the Case of the Lady Wingfield, 3 H 7. 14. and Stamford 63. 64. And it is true in Actions real, it is sufficient to traverse the title of the Demandant, without making title to the Tenant himself: As in a Formdon, *No dona pas;* But in Actions personal it is otherwise, as 2 H 4. 14. In Ravingishment of Ward, it is not sufficient to traverse the title of the Plaintiff, but the Defendant ought also to make title to himself: Fenner Serjeant contrary: who took exception to the Writ, because it is brought against the Incumbent only without naming the Patron or Ordinary: For here the Defendant hath pleaded, that he is Patron in possessor of the Church aforesaid of the presentment of the said Twinko, and that he is admitted, instituted and inducted, and hath continued in his Church so many dayes and years, in which Case the Writ ought to have been brought as well against the Patron and Ordinary, as against him the Incumbent: But in some Cases it is sufficient against the Incumbent only, as upon a Collation by Lacie, 9 H 6. 32. by Babbington: So where the Defendant is disturber without any presentment, 7 H 4. 92. so where the Defendant was deprived, and kept himself in 4 E 4. 18. So where the Pope makes Prohibition, 11 H 4. Quare Impedit 120. So a Sci. fac. upon a Recovery

very in a Quare Imped shall be brought against the Incumbent only, 1 H 5. 8. for by the Judgement in the Quare impede, the right of the Patronage is bound; and the Scire facias is only for the possession which concerns the Defendant only, and no other. And to prove that by the Common Law, a Quare Imped lay not (but upon such special matter) against the Incumbent alone, it is clear upon the said Statute of 25 E 3. For before the said Statute the Incumbent could not plead any matter which did trench to the right of the Patronage, and therefore we ought not to presume, that the common Law was so unreasonable, to give an Action against a singular person, who could not by the Law shew and defend his own right, nor traverse the right of the other party: And as to the plea here, he conceived that the same plea which the Patron might have now after the Statute of 25 E 3. the Incumbent shall have; but he who is only a disturber not in by presentment, &c. he shall not plead any matter but in discharge or excuse of the disturbance, 47 E 3. 8. The King in a Quare Imped counted. That King H was seised, and presented one A, King H dyed, and the Abbowson descended to King E 3. A dyed, the now King presented B, and now B is dead, so it belong to the King to present, that the Defendant being Incumbent traversed the institution and induction of B, without making title to himself. So 44 E 3. 19. in a Quare Imped the King declared that he himself was seised and presented one B, who at his presentment was received, &c. B dyed, by which it belonged to the King to present; to which the Defendant being Incumbent pleaded, that the said B is yet alive, and that plea was allowed without other title made to himself. Note, that at the first Argument of this case, that the Court was of opinion against the Defendant, because he had not in his plea any interest in the Abbowson, and by Periam the Patron himself could not have had such plea if he had been party to the Writ, therefore not the Incumbent, and it is no good pleading in any Action, to discover in pleading any wrong, as force, dissesion, usurpation; But at the length Mutata opinione, all the Justices were agreed, that Judgment should be given against the Queen: And the Lord Anderson shewed openly, the reason of their Judgement, for here is not bare usurpation pleaded against the Queen, but also an estate, scil. a lease for years in the said Abbowson derived from Queen Mary, and that the Abowdace upon which the Action is brought falleth within the said Term, so as the Queen who is Plaintiff is encouerted with the Lease of her Ancestors, against which she cannot make title to present, without special matter; wherefore Judgment was given against the Queen.

Mch. : 8. and 29. Eliz. in the Common Pleas.

LIX. Kynters Case

Debt.

Kynter brought debt upon an Obligation, the condition was, that whereas the Plaintiff had bought of the Defendant a Ship, if then the Defendant shall enjoy the said Ship, with all the furniture belonging to the same, without being disturbed for the said Ship or any furniture appertaining to it; that then, &c. and the Case was, that after the sale of the said Ship a Stranger sued the Plaintiff for certain moneys due for certain ballast bought by the Defendant for the same Ship and put into the said Ship before the sale of it, and in the said suit the Plaintiff obtained a Judgement and Execution, and thereupon the said Ship was seised, and all the matter was, if Ballast be furniture of a Ship or not: And it was moved by Serjeant Gawdy, that it was; for Ballast is as necessary to a Ship as a Hull; but the Court was against him, for sometimes a Ship may sail without Ballast, for it may be laden with such Merchandizes which are convenient Ballast in themselves, as Coals, Wheat,

will heat, &c. Periam at the first doubted of it: and by him, if I be bound upon condition, ut supra, I am bound to deliver the Guns being in it at the time of the sale, but yet he conceived, that the Plaintiff should be barred because he had not specially shewed, that at the time of the sale, that the ballast was in the ship.

Mich. 28. and 29. Eliz. in the Common Pleas.

L X. Pendleton and Gunstons Case.

Pendleton informed against Gunston upon the Statute of 13 Eliz. Cap. 5. for that, where the said Pendleton had before brought a plaint of Debt against I S in the Guild-hall of Norwich, upon which issued out of the said Court an Attachment against the said I S, by which the Sheriff of Nor. being ready by virtue of the said processe to attach the said I S by his goods, there, the now Defendant in disturbance of the said processe and the execution of it, did publish and shew to the Sheriff a conveyance, by which he claimed the said goods as conveyed to him by the said I S, &c. and averted the fraud, &c. and it was moved by Serjeant Snagg, that the matter of which the Defendant is charged is not within the said Statute, because the abiding of the said conveyance doth not go in delay of the execution, for no Judgment is given but only in delay of processe; but the Court was clear of opinion to the contrary, and that by reason of the Statute and the words of it, scil. delay, hinder, or defend Creditors of their just and lawful Actions, suits, &c. for here is a delay, for want of serving the said Attachment, the Appearance of I S to the suit of the Plaintiff is delayed, which mischance is within the remedy of the said Statute. And Periam and Rhodes Justices conceived, that such abiding of such conveyance, where no suit is depending is within the said Statute, which Anderson doubted. See the pleading of this Case reported in the second Book of Entries, 207, 208. 30 Eliz. per quod secta fuit, impedita fuit, &c.

LXI. Mich. 28 and 29. Eliz. in the Common Pleas.

Fenner Serjeant moved this Case. An Alien purchaseth Lands in Fee; Alien Purchaser shall bind the Queen; and it seemed to some that it should, for by the Lord Anderson, when an Alien is enfeoffed he receiveth by the Liberty the Fee-sim. Confirmation, of which he shall be seised, until Office be found, and a Precipe quod reddat lyeth against him. And by Fenner an Alien and Denizen Joyn-tenants are disseised, they both shall joyn in Assize, vide 1 i H. 4. 26. and by him, the Kings Heire being an Inheritor takes a Husband, and have issue, Office is found, the Husband shall be Tenant by the Curtesie, which see 33 E. 3. Traverse 36. It was argued of the other side, that the estate of the Alien is so feeble, that a confirmation cannot enure upon it, for an Alien cannot take but to the use of the King, and cannot be enfeoffed to another use, and if he be, such use is void, for there is not a sufficient seisin in the Alien to carry an use, and it hath been adjudged in the Case of one Forcer, that where an Alien and the said Forcer were Joyn-purchasers, and the Alien dyed, Forcer had not the whole by the survivor, but that upon an Office found, the Queen should have the moiety: See Dyer 11 Eliz. 288.

Mich. 28. and 29. Eliz. in the Common Pleas.

LXII. Sir Roger Lewknor and Fords Case.

SIR Roger Lewknor seised of the Mannor of Wallingford, leased the same to him for years, and dyed, after which it was Enacted by Parliament, That the said Mannor shoulde from henceforth be deemed and reputed in the Heirs of the body of the said Sir Roger, begotten upon Elizabeth his Wife, the said Sir Roger having three Daughters only, without any other issue: The Daughters married Husbands and had issue: A assigned his interest in the said Mannor to B, C and D, and also to one Shelley; B, C, and D assigned their interest to one Sporer, one of the Defendants, and Shelley assigned his fourth part to Ford another of the Defendants, excepting the Woods and Underwoods. *W*ast is committed; one of the Daughters having issue byth, living her Husband, the two surviving Sisters and their Husbands, the Term being expired, brought a *W*rit of *W*ast, leaving out the Husband of the third Sister, who was Tenant by the Curtesie, against Shelley and Sporer, who tenuerunt. Shurleworth Sergeant took Exception to the *W*rit: scil. predictus Rogerus cuius heredes ipse sunt, which shall be intended Heirs general, and by the Declaration it appeareth, that the Daughters have to them by Act of Parliament an especial inheritance as Heirs in special tail, and that by a special conveyance: and therefore the Plaintiffs ought to have brought a special *W*rit, according to their Case, as where Cestuy que use, maketh a lease for years by the Statute of 1 R. 3. and the Lessee committeth *W*ast, now the Feoffees ought to have a special *W*rit of *W*ast, according to their Case, 26 H. 8. 6. but that exception was disallowed, and the case cited out of 26 H. 8 is upon another reaon, for in such case the estate of the Lessee for years is created by the said Statute. Another Exception was taken to the *W*rit, for the *W*rit is tenuerunt, which shall be intended prima facie, conjunctim tenuerunt, and in the Declaration it appeareth, that one of the Defendants is assignee of three parts of the Lands demised, and the other Defendant of the fourth part, and so separatis tenuerunt, but that Exception was also disallowed, because originally it was one, and intirely demised interest and estate, and so it remaineth as to the Plaintiffs, although it be divided by the Lessee himself. Another Exception was taken to the *W*rit, because here it appears upon the Plaintiffs shewing, that Sir Roger Lewknor had three Daughters, and that they have all taken Husbands, and that they have issue, and that one of the laid Daughters is dead, living her Husband, who is not named in the *W*rit, for which cause the *W*rit shall abate: See 22 H. 6. 24, 25. But that Exception was also disallowed, for as this Case is, there is not any reason, that the Tenant by the Curtesie should joyn in this Action, for no judgment shall be given here, that the Plaintiffs shall recover the place wasted, for the term is expired, as it appeareth by the words of the *W*rit, scil. quas tenuerunt, and the Tenant by the curtesie is in possession, and where Tenant by the curtesie and the Heir joyn in an Action of *W*ast, Tenant for life shall have Locum vacatum, and the Heir the damages, which see 27 H. 8. 13. As unto the matter of Lain, upon the Exception of Woods and Underwoods, it was argued by Shurleworth, that the Action of *W*ast was not well brought against Ford, &c, for the Assignment made by Shelley to Ford was with an exception of all Woods and Underwoods, and therefore Shelley remained Tenant, and he ought to answer for the Wood and the Underwood in the Action of *W*ast, for upon every demise of Lands the Woods there growing are as well demised as the Land it self, for so it appeareth by the *W*rit of *W*ast in dominibus & boscis dimissses ad terminum annorum, &c, which proves, that the Trees

are parcel of the demise, and so may be excepted : See Dyer 28 H 8. 19. by Shelley and Baldwin. A man lealeth a Mannor, except Woods and Underwoods, the Lessee cuts the Trees, an Action of Wast doth not lie against him for the same, for the thing in which the Wast is supposed to be committed was not demised, &c. and therefore the Lessee shall be punished as a Trespassor and not as Farmer : Fennier herjeant contrary, and that the Exception of the Woods and Underwoods is merely void, for Shelley who assignes his interest with the said Exception, hath not any such interest in the Woods and Underwoods, so as he can make such exception, for he had but an ordinary interest in them as Farmer, viz. House-boot, Hedge-boot, &c. which interest cannot by any meanes upon an Assignment be reserved to the Assignee, in grosse of the estate, no more then if one hath common appendant to his Land; and he will make a Feasment of the Land, referring or excepting the common. And he who hath the inheritance of the Land hath an absolute property in the Trees, but the Lessee hath but a qualified interest, and therefore 21 H 6. 46. the Lessor during the term for years may command the trees to be cut down: and 10 H 7. 3. Lessee for years hath not any interest in the trees, but for the loppings, and for the shadow for his Cattel : And in the Case cited, where Lessee for life and he in the Reversion make a Lease for life unto a stranger, and wast is committed, and they bring an Action of Wast, the Lessee for life shall have the place wasted, and he in the Reversion the treble damages, for in him was the true and very property of the Trees, and therefore the treble damages do belong unto him, and not to the Lessee for life, who joyneth with him; and the reason wherefore the Lessee for life or yeares shall recover treble damages against a stranger who cuts down any trees growing upon the Land to him demised, is not in respect of any property that the Lessee hath in the trees cut down, but because he is chargeable over to his Lessor in an Action of Wast, in which he shall render damages in such proportion. See 27 H 6. Wast. 8. A lease for life is made without impeachment of wast, a stranger of his own wrong cuts down trees, against whom the Lessee brings an Action of Trespass ; in such Case he shall not recover treble damages, not for the trees, but only for the breaking of the Close, and the loppings, for he is not chargeable over to his Lessor for the same, because that his Lease was made without impeachment of Wast ; and if the Lessee hath such a slender interest in the Trees where his lease is without impeachment of wast, his interest is lesse, where it is an ordinary lease without any such privilege : And the property which the Lessee for years hath in the Trees in such Case, is so appropriated to the possession, that it cannot be severed from it : Windham and Anderson Justices were of opinion, that the Exception above is merely void : For Ford the Assignee of Shelley is now Tenant and Farmer, who alone can challenge interest in the Trees against all but the Lessor, and Shelley after his Assignment, is merely a stranger. The interest of the Lessee, and also of his Assignee in the Trees is of necessity, and follows the Farm and the Land as the shadow doth the body ; And by him, where Lessee for years by reason of his lease is to have Wind-sals, yet he cannot employ them but to the benefit and profit of his Farm, for if he sell them or spend them elsewhere he shall be punished. Rhodes and Periam Justices, that the exception is good as the fruits of the Trees, Shovelers, &c. And afterwards the Case was adjudged upon another poynt in the pleading, so as the matter in Law did not come to Judgment : See Saunders Case. 41 Eliz. Where Lessee doth assigne, excepting the Timber trees, it is a void Exception.

Pasch. 29. Eliz. in the Kings Bench.

L X I I I . Gray and Jeffes Case.

Action of as-
fault and Bar-
tory.

In an Action upon the Case by Gray against Jeffes, the Plaintiff declared, that where he had placed his Son and Heir apparent with the Defendant, to be his Apprentice, and to learn of him the Art of a Tailor: That the Defendant had so beaten his Son with a Spade, that he thereupon became lame, by reason of which he could not have so much with his Son in marriage of him as otherwise he might have, because the same lamenesse is a disparagement to his said son: And further shewed, that he himself might spend twenty pounds per annum in Lands. Haulton argued for the Plaintiff. The Action Quare filium & heredem cepit & abduxit, is given to the Father in consideration that the marriage of his Son and Heir doth appertain to him by the Law, and here by the Battery the Son is become so lame, that he is not so commendable to a Marriage as before; and if the Father had lost the whole marriage, then the Father should have had the Action Quare filium & heredem, &c. but here he hath not lost the whole marriage, but the marriage is lessened by it, and therefore he shall have this Action. Tanfield contrary; I confess, that the Father ought to have the marriage of his Son and Heir so long as he is sub potestate patris; but here the Father hath committed all his interest, power and authority in his Son to the Defendant his Master, with whom he hath bound his Son Apprentice for seven years, during which term the Father hath not any thing to do with his Son or his Marriage. Wray: the Action Quare filium & heredem, &c. is not given to the Father, because his marriage belongs to him, but because of the Education; and such was the opinion of Clench Justice, and the marriage doth not belong properly to the Father: for if the Son marrieth himself without the leave of the Father there is not any remedy for the Father. And afterwards Judgement was given against the Plaintiff.

Pasch. 29. Eliz. In the Common Pleas.

L X I V . Bullers Case.

Replevin.

Edmund Buller brought a Replevin against two, who make Connans as Waylies to A for rent arrear reserved upon a lease for life, To which the Plaintiff in Barre of the Connans pleaded, that two strangers had right of Entry in the place where, &c. and that the said two Defendants by their Commandment entred, &c. and took the Cattel of which the Replevin is brought, damage seafants, absque hoc, that they took them as Waylies to the said A, and upon that Traverse the Defendants did demurre in Law, Shucklowe worth Serjeant; the Traverse is not good, for by that means the intent of the party shall be put in issue, which no Jury can try, but only in Case of Recaption. See 7 H. 4. 101. by Gascoign. If the Wayly upon the distresse shew the cause and reason of it, he cannot afterwards vary from it, but the other party may try him by Traverse; but if he constrain generally without shewing cause, then he is at large to shew what cause he will, and the other party shall answer to it. And it was said by the Court, that when a Wayly disrecons he ought, if he be required, shew the cause of his distress, but if he be not required, then he is not tied to do it. Anderson. We were all agreed in the Case betwixt Lowin and Hordin, that the Traverse, as it is here, was well taken. The Number follof that Case is M. 28 and 29 Eliz. 2494.

Pasch. 29. Eliz. in the Kings Bench.

L X V . Hudson and Leighs Case.

Hudson recovered against Leigh in an Action of Battery, for which a Cause was issued against Leigh; and also a Capias ad Satisfaciendum, returnable the same Term at one and the same Return: As to the Capias pro fine the Sheriff returned Capi, and as to the Capias ad satisfaciendum, non est inventus: And for this contrariety of the Return, the Court was of opinion, that the Sheriff should be amerced; but it was moved by the Council of the Sheriff, that the awarding of the Capias pro fine was merely void, for the fine is pardoned by the Parliament. And it is also Enacted, That all process awarded upon such fines shall be void, and then the Capias pro fine being void, it matters not how or in what manner it be returned, for the Court shall not expect such process, nor any return of it, and then the Court not having respect to that Return, there is not any contrariety, for the Capias ad satisfaciendum only is returned, and not the Capias pro fine. And at another day it was moved again; the Battery was supposed, 1 Junii 1586. and Judgement given the thirteenth of February the same year, upon which issued Capias pro fine, and before the Return thereof the Parliament ended, which pardoned such fines, and made all process thereupon void: And it was said by the Court, that if the Sheriff in such Case takes the party by a Capias pro fine, new upon that taking he is in Execution for the party, and if the Sheriff let him go at large, he shall answer for the escape: And in that case the Capias pro fine was well awarded, and the Court ought to regard it, and the Defendant lawfully taken by virtue of it, and also in execution for the party in Judgement of Law, and afterwards when the Parliament came and Enacted ut supra, although the process be made void thereby, the same ought to be meant as to the interest of the King in the fine, and the vexation of the Subject by it, but not as to the Execution of the party, but the Sheriff shall answer for that. And it was also holden by the Court, that if the Plaintiff sueth an Ejectment upon the Capias pro fine executed, the Defendant shall not be adjudged in Execution for the party, for he hath made his Election of another manner of Execution, scil. of the Land, and he shall never resort to an Execution of the body, 13 H. 7. 12. And as our case is here there was an Ejectment obtained, but it was not on Record, nor any Record made of it, and therefore the election of the Execution remained to the Plaintiff; And as to the point aforesaid, that such process shall be void, as to the King only, not as to the party: See now 5 Jac. C 6. part. 79. Sir Edward Phirtons Case.

Pasch. 29. Eliz. In the common Pleas.

L X V I . Potter and Stedals Case:

In Trespass by Samuel Potter against Stedal the Case was, Tenant for life of Land leased parcel thereof to hold at will, and being in possession of the residue, levied a Fine of the whole, the Lessor entered into the Land which was let at will in point of forfeiture, in the name of the whole; it was holden the same is a good entry for the whole: But if the Disseisor leaseth for years part of the Land, whereof the disseisin was committed, and the disseilee afterwards entreth into the Land which continueth in the possession of the Disseisor in the name of the whole, the same Entry shall not extend to the Land leased, for here the Lessee is in by title, but in the other Case not, for when Tenant for life leaseth it at will, and afterwards levies a fine, the same is a determina-

tion of the Will. .16 Eliz. Dyer 377. 1. In the same plea it is as holden, that if there be lesse for life, the remainder for life, the remainder in fee, Les- see for life in possession leveth a Fine Sur Conulsans de droit, &c. to his own use, upon that fine a fee simple accrues.

P. 29. Eliz. in the Common Pleas.

L X V I I . Leigh and Hanmers Case.

Debt upon a
Recognition

Thomas Leigh Esquire brought an Action of Debt upon a Recognition in the nature of a Statute Staple against John Hanmer Esquire, before the Mayor and Aldermen of London, in Camera Guild-hall Civitatis predict. and demanded one thousand five hundred pounds, upon such Recognition acknowledged 20 November, 20 Eliz. and upon default of the said Hanmer, according to the custom of London used in course of Attachment, attached six hundred pounds in the hands of one W. Bolton of Grays-Inne, in part of satisfaction of the said debt of one thousand five hundred pounds; and now within the year came the said Hanmer, & ad discretionandum debitum predict. had a precept of Scire facias against the said Thomas Leigh, and after pleaded, and demanded Dyer of the said Recognition, and had it, & quod ipse restitutionem of the said six hundred pounds, in manus dict. W. Bolton attachiat habere debet: And upon the whole Record the Case was thus: Rowland Leigh Esquire, being seised of certain Manors and other Lands in the County of Gloucester, had little Eliz. his Daughter and Heir inheritable to the said Lands, and by Indent. dat. 20 Maii 19 Eliz. granted Custodiam, regulam, gubernacionem, educationem, & maritagium dict. Eliz. to the said Tho. Leigh, after which the said Tho. Leigh by Indenture 24 Martii 29 Eliz. granted and assigned the said custody, rule, government, education, and marriage, and all his interest therin, and the said Indenture, to Sir John Spencer, after which the said Sir John Spencer and Thomas Leigh, by their Indenture the 26. of August 20. Eliz. granted and assigned to the said John Hanmer the said custody, rule, government, education and marriage of the said Eliz. and all their interest in the same, and all the recited Indentures, by which last recited Indenture 29 August, the said John Hanmer covenanted with the said Leigh, that Thomas Hanmer son an Heir apparent of the said John Hanmer, maritaret & in extremo duceret dictam Elizabetham ad vel antequam dicta Eliz. & dictus Tho. Hanmer perimplerint suas separatas annates 14. annorum, si dicta Eliz. ad id descendere & agere veller; and afterwards before the said Tho. Hanmer and the said Elizabeth, suas separates annates 14. annorum perimplivissent, sc. 8. die Sept. 20 Eliz. the said Tho. Hanmer took to wife the said Eliz. the said Tho. Hanmer then being annatis 13. annorum and no more, and the said Eliz. then being of the age of nine years and no more, and Thomas Hanmer aforesaid over-lived, &c. And pleaded further, that the said Tho. Hanmer after he attained his full age of fourteen years, and before any agreement or assent by the said Tho. Hanmer to the marriage aforesaid betwixt the said Tho. Hanmer and the said Eliz. had, at or after, idem Tho. Hanmer came to his age of fourteen years, scil. 10. die Sept. Anno 21 Eliz. ad dictum maritagium disgregavit, & maritagium illud renunciavit; and all this matter was pleaded in Barre, as performance of the Covenant contained in the Indenture of seazance made upon the Recognition, whereupon the Action is brought. And concluded his plea, unde petit judicium si dictus Tho. Leigh actionem suam predict. &c. Et quod ipse idem Johannes Hanmer restitutionem dict. 600 li. sc. ut praesert attachiat habere valeat. And all the question here was, if this marriage had by the manner and afterwards renounced as aforesaid, be such a marriage as is intended in the Covenant, so as the said Covenant be satisfied by it.

it. And it was argued before the Mayor, Recorder, and Aldermen of London, in their Guild-Hall by Anger of Grays-Inne, on the part of Leigh the Plaintiff, and he in his Argument did much rely upon the definition of marriage, by Justinian in his Institutions. *Nuptiz maris & feminæ conjunctio individua continens vita societatem*; and the marriage here in question is not according to the said definition, for the persons, parties to this contract, are not persons able by Law to make such contract, because that non actigerunt annos nubiles, Ergo, nuptiz esse non possunt, but only sponsalia, a step unto marriage; And there is also rendred one reason of the said definition upon the w^mn individual, individual dico, quia non nisi morte aut divorcio separandam, but the marriage now in question might be dissolved without death or divorce, as it is in our case by disagreement: And see Jurisprudentia Romana, Lib. 1. Cap. 33. *Societas & conformatio omni vita inter marem & feminam ad concubitum*, which is societatis hujus consummatio: And as every Act doth consist upon three things, 1. Inception, 2. Progressio, 3. Continuatio, so is it in the Case of marriage; but in this case when Thomas Hamner took the said Eliz. to wife, that is but an inception, but the progression and consummation of it is cut off by the disagreement, and he much relied upon the words of the Covenant, si dicta Eliz. ad id condescendere & agreeare veller, so as there is not any liberty left to the Defendant for the agreement or disagreement of the Son, but he ought to agree at the perill of his Father, but if Eliz. will not agree, then the Defendant is not at any mischeif, so in such case the Covenant doth not extend to him, and also here the Father is bound that his Son, a stranger to the Obligation should marry the said Elizabeth, which he ought to procure at his perill, or otherwise he shall forfeit his Wont: Egerton Solicitor of the Queen argued to the contrary, This marriage as much as concernes this Covenant, is to be considered according to the reason of the common Law, and not according to the rules and grounds of the Canon or Civil Law, not as a marriage in right, but as a marriage in possession, and marriage in possession is sufficient alwayes in personal things and causes, especially where the possession of the wife is in question, but where the possession of the Husband is in question, there marriage in right ought to be, and where marriage in possession is in averment, there it shall not be tryed by the Bishop, as in the Case of a marriage of right, where, never accounted in loyal matrimony, is pleaded, but by the Country, so in case of wife in possession, never accounted in matrimony, is no Plea, but not his wife, which see 12 E. 3. br. 481. A brought an Action of Trespass against B, and C. B pleaded, that C is wife of the Plaintiff, and demanded Judgement of the wife, the Plaintiff by Replication said, never accounted in Lawfull matrimony, but it was not allowed, but was driven to say, not his wife, for if C was the wife of the Plaintiff in possession as by Reputation, it is sufficient to abate the wife: see also 49. E. 3. 18. by Belknap, the right of the Spoull is alwayes to be tryed by the Bishop, but the possession of the marriage, not as in Assize by A and K his wife, the Tenant demanded Judgement of the wife upon speciall matter, and concluded, so is the said K our wife, and not the wife of A, so in a cui iuxta by B and C his wife, the Tenant pleaded, never accounted in loyall matrimony, the same is no answer to the wife, for shee demanded in her own right, and if he who aliened was her Husband in possession, the wife could not have other Action, scilicet Assize both not lye, because he was her Husband in fact at the said time in possession: And see also 50. E. 3. 20. adjudged according to the opinion of Belknap: And see also 39. E. 3. As to the marriage in right, as the case in question is, for upon such marriage, if the Husband be murdered before disagreement, the wife shall have an Appeal of Murder, and a Writ of Dower: see where Appeal is brought of the Rape of his wife, although shee be his wife but in possession, and not in right, 11. H. 4. 13: by Hulls 168. and by Littleton, if the wife be of the age, but of nine years, shee shall

shall have Dower, which see also 35. H. 6. and yet Dower shal never accrue but in case of marriage in right, for there never counted in marriage, is a good Plea, vi. 12. R. 2. Dower 54. In Dower the Tenant pleaded, that the Husband at the time of his death was but at the age of ten yeares, and the Defendant now but of eleven yeares, and yet Judgement was given for the Defendant, for by Charleton the same was a marriage in right untill disagreement, see 22. Eliz. Dyer 369. A woman in full age marrieth a Husband of twelve yeares, who dyeth before the age of consent, the same is a good marriage, and so ought to be certified by the Bishop, and 7. H. 6. 11. by Newton, a woman married within age of consent may port an Action as a feme sole, and the Will it did abate, Stamford Prerogat. 27. 19. E. 3. Judgement 123. In a Writ of Ward, the Jury found, that the Infant was of the age of ten years, and no more, but they did not know whether shee were married or not, but de bene esse, if he be married, assess damages one hundred pounds, and if not, five pounds upon which it appeareth that marriage at such an age is such a marriage upon which the Lord shal recover damages; See 13. H. 3. gard. 148. such marriage in the life of the Ancestor, infra annos nubiles, if there be no disagreement shall bind the King: And after the death of the Ancestor, the hōire shal remain in custodia Domini Regis, usq; ad actarem ut consentiat, vel dissentiat, 45. E. 3. 16. In a Writ of Ward, the Infant was found of the age of twelue yeares, and the Jurors gave damages three hundred marks, if he were married, and 27. H. 6. gard. 118. & 47. E. 3. Br. Trespass 420. and Fiz. Action upon the Statute 37. Trespass, de muliere abducta cum bonis viri, where the wife is within the age of consent: And if I be bounden unto another in an Obligation, upon condition to pay a sum of money upon the marriage day of IS, now, if IS be married within the age of consent, I am bound to pay the money the same day, although afterwards the parties do dissent, and the wife of such a marriage shall be received in a Plea reall upon the default of her Husband, & the words, si dicta Eliz. ad id condiscendere & agreeare veller, are to be understood of an agreement at the time of the marriage, and here the time is limited for the solemnization of the marriage, scil. at or before they shall have accomplished their severall ages of twenty one yeares, makes the matter clear; For it is in the election of Hammer the Father, to procure this marriage, scil. that his Son shall take to Wife, the said Elizabeth, at which of the two times he will, scil. at or before, &c. to the marriage before, &c. is as effectual in respect of the performance of this condition, as if the marriage had been had after, and as the case is, the condition could not be better performed, for if the marriage had been stayed till after fourteen years, &c. although the marriage doth not ensue, yet the Obligation had been forfeited, and that the marriage be solemnized just at the ages both of fourteen yeares, was impossible, for Thomas Hammer was the elder by two yeares, then the said Elizabeth, and therefore they ought to be married at such time which might stand with the condition, and the same is done accordingly: And as to that which hath been objected, That now by disagreement the marriage is determined, we ought to observe that Hammer was bounden for the performance of the Covenant, and that his son and heir apparent marriaret, & in uxorem duceret dictam Eliz ad vel ante, &c. which is executed accordingly, and he is not bounden for the continuance of the said marriage, but the continuance of the same ought to be left to the law, which giveth to the parties libertie to continue the marriage by agreement, or to dissolve it by disagreement; And therefore if I be bounden to you, that IS (who in truth is an Infant) shall levy a fine before such a day, which is done accordingly, and afterwards the same is reversed by Err, yet notwithstanding the condition is performed, &c. And afterwards Judgement was given against the Plaintiff.

Pasch. 29. Eliz. in the Common Pleas.

L X V I I I . *The Earl of Warwick and the Lord Barkleys Case.*

A mbrose Earl of Warwick and Robert Earl of Leicester brought a *Writ* of Partition against the Lord Barkley, in which the parties pleaded to issue. And now at the day of the Enquest the Defendant did challenge, that in the whole Pannel there were but two Hundreders, and at the first it was doubted by the Court, if upon the Statute of 27 Eliz. cap. 6. by which it is enacted, That no further challenge for the hundred shall be admitted if two sufficient Hundreders do appear, the Enquest shall be taken: But at length the whole Court was clear of opinion, that the said Statute did extend but to personal Actions; but this Action of Partition is a real Action; and summons, and severance lies in it, but not process of outlawry, and therefore here four Hundreders ought to be returned; so in an Action of *Wast*, although it be in the personality: and therefore the Council of the Plaintiffs prayed a Tales.

Pasch. 29. Eliz. in the Common Pleas.

L X I X . *The Archbishop of York and Mortons Case.*

T he Archbishop of York recovered in an Assize of Novel disseisin against one Morton before the Justices of Assize; upon which Judgement Morton brought a *Writ* of Error before the Justices of the Common Pleas, and after many motions at the barre, it was adjudged that a *Writ* of Error upon the said Judgement did not lie in the said Court. 18 Eliz. Dyer 250. F B 22. That upon Erronious Judgement given in the Kings Bench in Ireland, Error shall be brought in the Kings Bench in England, 15 E 3. Error 72. Fenner who was of Council with the Archbishop demanded of the Court how, and in what manner the Record shall be remanded to the Justices of Assize, so as the ArchBishop might have execution; To which the Court said, that the surest way is to have a certiorare out of the Chancery into the Common Pleas directed to the Judges there; and then out of the Chancery by Writs to the Justices of Assize. But Fenner made a difficulty of it to take such course for the remanding of it, for doubt they would not allow it to be a Record where it is not a Record, for upon the matter the Record is not removed, but remains with the Justices of Assize. Then Anderson said, Since Execution out of the said Record, but because the Record came before us by *Writ* of Error, it shall be also removed and remanded by *Writ*: and so it was.

Pasch. 29. Eliz. In the Common Pleas.

L X X . *Kempe and Carters Case.*

T homas Kempe brought Trespass for breaking of his Close against Carter: and upon pleading they were at issue, if the Lord of the Manors aforesaid granted the said Lands per copiam rotulorum curiae manerii predict. secundum consuetudinem manerii predict. and it was given in Evidence, that within the said Manors were divers customary Lands, and that the Lord now of late at his Court of the said Manors granted the Land, &c. per copiam rotulorum

Evidence of customs.

tulorum curiæ, where it was never granted by copy before : It was now holden by the whole Court, that the Jury are bound to find, Dominus non concessit, for notwithstanding that de facto Dominus concessit per copiam rotulorum curiæ, yet, non concessit secundum consuetudinem manerii predict. for the said Land was not customary, nor was it demiseable, for the custome had not taken hold of it. In the same Case it was also shewed, that within the said Pannor some customary Lands are demiseabe for life only, and some in Fee; And it was said to that by the Lord Anderson, that he who will give in Evidence these several customs, ought to shew the several limits in which the several customs are severally running, as that the Pannor extends into two towns, and that the Lands in one of the said Towns are grantable for lives only, and the Lands in the other in Fee, and he ought not to shew the several customes promiscue valere through the whole Pannor : And he remembred a Case of his own experiance : scil. The Pannor of Wadburst in the County of Sussex consisted of two sorts of Copy-hold, scil. Hook-land and Bond-land, and by several customs diverseable in several manners: as if a man be first admitted to Hook-land, and afterwards to Bond-land, and dyeth seised of both, his Heir shall inherit both; but if he be first admitted to Bond-land, & afterward to Hook-land, and of them dyeth seised, his youngest Son shall inherit, and if of both simul & semel, his eldest Son shall inherit; But if he dyeth seised of Bond-land only, it shall descend to the youngest: and if customary Land hath been of ancient time grantable in Fee, and now of late time for the space of forty yeares hath granted the same for life only; yet the Lord may if he please resort to his ancient custom and grant it in fee. It was also moved in this case, If customary Land within a Pannor hath been grantable in Fee, if now the same Escheat to the Lord, and he grant the same to another for life; the same was holden a good grant, and warrantable by the custome, and should bind the Lord, for the custome which enables him to grant in Fee shall enable him to grant for life; and after the death of the Tenant for life, the Lord may grant the same again in fee, for the grant for life was not any interruption of the custome, &c. which was granted by the whole Court.

Pascb. 29. Eliz. in the Common Pleas.

L X X I. Walker and Nevils case.

Dower.

Damages.

Walker and his wife brought a writ of Dower against Service Nevil, and judgement was given upon Nihil dicit, and because the first Husband of the wife dyed seised, a writ of Enquiry of Damages was awarded, by which it was found, that the Land which she ought to have in Dower, the third part was of the value of eight pounds per annum, and that eight yeares clasperunt a die morti viri sui proximè ante inquisitionem & assellant damna to eight pounds, and it appeared upon the Record, that after Judgment in the writ of Dower aforesaid the Demandants had execution upon habere facias fesinam, so as it appeareth upon the whole Record put together, that damages are asselld for eight years, where the Demandants have been seised for part of the said eight years, upon which the Tenant brought a writ of Error, and assigned for Error, because damages are asselld until the time of the Inquisition, where they ought to be, but to the time of the Judgement; but the Exception was not allowed; Another Error was assigned, because that where it is found, that the Land was of the value of eight pounds per annum, they have asselld damages for eight years to eighty pounds, beyond the Revenue; for according to the rate and value found by verdict it did amount but to sixty four pounds: but that Error was not also allowed; for it may be, that by the long detaining of the Dower, the Demandants have sustained more damages then the bare

bare Revenue, &c. Another Error was assigned, because Damages are assed for the whole eight years after the death of the Husband, where it appear-
eth, that for part of the said years, the Demandants were seised of the Lands
by force of the Judgement and execution in the Writ of Power; and upon
that matter the writ of Error was allowed.

Pascb. 29. Eliz. in the Common Pleas.

L X X I I . Archpoole against the Inhabitants of Everingham.

I S an Action upon the Statute of Winchester of Huy and Cry by Archpoole
against the Inhabitants of the Hundred of Everingham, the Jury found, that
the Plaintiff was robbed 2 Januarii post occasum solis, sed per lucem diurnam,
and that after the Robbery committed, the Plaintiff went to the Town of An-
dover, and advertised the Wayles of the said Town of the said Robbery; and
further found, that the said Town of Andover is not within the said Hundred
of Everingham, and that there is another Town nearer to the place where, &c.
the Robbery was done, then the said Town of Andover within the said Hun-
dred, but the said Town of Andover was the nearest place where, &c. by the
Blags high-way: It was moved that upon this matter, that the Plaintiff
should not have judgement, for that he hath not made his fresh suit according to
the Law, for he ought to have begun his Fresh-suit within the Hundred where
the Robbery was done: and it was also objected, that the Robbery was done
post occasum solis, in which Case the Hundreders are not to pursue the Hale-
factors. And Walmsey Serjeant cited a Case out of Bracton: Si appellatus
se defendit contra appellantem tota die usque ad horam in qua Stellæ incipiunt
apparere, recedit quietus de appello, and it is not reason to drive the Hun-
dredders to follow sellers at such a time, when for want of light they cannot see
them. And all the Justices were clear of opinion, that if the Robbery was
done in the night time, the Inhabitants are not bound to make the pursuit:
And by Rhodes, if in a Precipe quod reddit of Lands, the Sheriff sum-
mons the Demandant upon the Land in the time of night, such a summons is
merely void.

Pascb. 29. Eliz. in the Common Pleas. Instrat. Trin. 28. Rot. 1458.

L X X I I I . Wiseman and Wifemans Case.

I S an Action of Debt by Wiseman against Wiseman, the Case was, that one Wiseman was seised of the Lands, and by his Will devised, 1. I will and bequeath unto my wife B. acre for the Term of her life, the remainder to my Son Thomas in tail: Item I will and bequeath unto my Son Thomas, all Devises: my Lands in D, and also my Lands in S, and also my Lands in V. Also I give and bequeath unto the said Thomas my Son all that my Island of Land enclosed with water which I purchased of the Earl of Essex: To have and hold all the said last before devised premises unto the said Thomas my Son, and the Heirs of his body: The only matter was, If the Habendum shall ex-
tend to the Island only, in which Case Thomas shall have but for life in the
Lands in D, S, and V, or unto the Island, and also to the Lands in D,
S, and V; in which Case he shall have Fee-tail in the whole. And it was
argued by Fender, that the Habendum should extend to the Island only;
as he said, the opinion of the Justices of this Court was in 4. Eliz. in another
Case. I devise my Mannor to D my eldest Son, and also my Land in S in
tail, in that Case the entail limited for the Land in S shall not extend to the

Extent of an
Habendum.

said Hanning, and of such opinion was Weston, Welch, and Dyer; Brown contra, that the Son hath in tayl in both. But if the words of the devise had been, I devise my Manors of D and my Lands in S to my Son in tayl, here the Son hath in estate tayl in both. So it hath been adjudged, that if I devise Lands to A, B, and C, successively as they be named, the same is good by way of Remainder: Walmesley contrary, and he relied much upon this, that the words of the Habendum are in the plural number. All the last before devised premisses, whereas the thing lately devised by the Will was an Island in the singular number, which cannot satisfie the Habendum, which is in the plural number, and therefore to verifie the plural number in the Habendum, the Habendum by fit construction shall extend to all the Lands in D, S, and V: and so upon his motion made at another day, it was resolved by all the Justices, that the Habendum should extend to all the said Lands, and the Habendum should not streighten the Devise to the Island only.

Pafch. 29. Eliz. in the Common Pleas.

LXXIV. Fullwood and Fullwoods Case.

Bail renders
himself in
court.

In an Action upon the Case, the Defendant put in bail to the Court to answer to the Action; and now Judgement being given against him, he came into Court and rendred himself, and prayed, that in discharge of his sureties, that the Court would recard the rending of himself, which was granted: And the Court demanded of the Plaintiff, if he would pay execution for the body against the Defendant, who said, he would not, whereupon the Court awarded, that the sureties should be discharged; and the Rule was entred, that the Defendant offered himself in discharge of his sureties, and Attornatus Querentis allocutus per curiam, &c. dixit se nolle, &c. Ideo consideratum fuit per curiam, quod tam predict. defend. quam predict. Manucaptores de recognitione predict. & denariis in eadem contentis exoneretur.

LXXV. Pafch. 29. Eliz. in the Common Pleas.

Feoffments.

Attornament.

The Case was, He in the Reversion upon a Lease for yeares, makes a Charter of Feoffment to divers persons to the use of himself for life, and after to the use of his eldest Son in tayl; and the words of the Charter were, Dedi, concessi, Barganizavi, & seoffavi, and he sealed and delivered the deed, but no livery of seisin was made; and afterwards he came to his Lessee for years, and said to him, that he had made a Feoffment, and shewed also the uses, but did not shew to whom the Feoffment was made, to whom the Lessee said, you have done very well, I am glad of it: And if that were a good Attornament was the Question: It was said, that that was the Case of one Arden. And Gent, and Manwood were of opinion, that the same was no Attornament, because it was not made to the Feoffees, scil. to the Grantee of the Reversion; and so it was tried in this Case, for Attornament ought to be to the Grantee himself, and not to Cestuy que use.

Pafch. 29. Eliz. in the Common Pleas.

LXXVI. The Parson of Facknams Case.

Tythes, and
where the spi-
ritual court
shall have ju-
risdiction of
them.

The Parson of great Facknam brought an Action of Trespass against the Parson of Hannington, and the Case was, If the Parson of one Parish claim by prescription a portion of Tythes out of the Parish of another, is the

the Spiritual Court shall have the Jurisdiction, for the tryal of it: And the opinion of the whole Court was clear, that it should, because that the matter is betwixt two spiritual persons, and concerning the right of Tythes. At 35. H. 6. 39. I Viccar of B brought Trespass for taking away of forty loads of Beans, &c. The Defendant pleaded, that he is Parson of the said Church of B, and the Plaintiff is Viccar, &c. and before the Trespass, &c. the Beans were growing in the same Town, and severed from the nine parts, and he took them as belonging to his said Church, and demanded Judgment of the Court, &c. The Plaintiff said, that he and all his Predecessors Viccars, &c. time out of mind, &c. have used to have the Tythes of such a Close, &c. belonging to his Viccaridge, and within the said Close the Beans were growing, and were parcel of his endowment; and that at the time of the taking they were severed from the nine parts: whereupon he took them. And it was holden by Ashton and Danby, because it is confessed on both sides that the Beans whereof, &c. were Tythes, the Right of which would come in debate betwixt the Parson and the Viccar, and both are spiritual persons, that the tryal thereof doth belong to the Spiritual Court. See 6 E. 4. 3. 22 E. 4. 23. 24. in such a matter betwixt Parson and Viccar there the Temporal Court was ousted of the Jurisdiction. See also 31 H. 6. 11. betwixt the Parson and the Servant of another Parson. 7 H. 4. 102. In Trespass by a Parson against a Layman, who said, that one A is Parson of a Church in a Town adjoyning to a Town where the Plaintiff is Parson, and that A let to him the Tythe, and demanded Judgement, &c. and pleaded to the Jurisdiction, and by Gascogine, the Plaintiff may recover his Tythes in the Spirituall Court.

P. 29 Eliz. in the Kings Bench.

LXXVII. Bunny against Wright and Stafford.

In Trespass the Case was this: Grindal Bishop of London leased parcel of the possessions of his Bishoprick for one and twenty years, and afterwards ousted the Vescire and leased unto another for three lives, rendzing the ancient and accustomed Rent, which was confirmed by the Dean and Chapter. And afterwards Grindall is translated: Cook argued, That the Lease is warranted by the Statute of 1 Eliz. At the Common Law a Bishop might make an Alienation in Fee simple being confirmed by the Dean and Chapter: But by 32 H. 8. cap. 28. Bishops without Dean and Chapter, or their confirmation may make a Lease for one and twenty years, but with the confirmation of the Dean and Chapter may make a Lease for one thousand years. But by the Statue of 1 Eliz. the power of Bishops in that right is much abridged, for now with confirmation or without confirmation they can not dispose of their possessions but for one and twenty years or three lives; and this Lease is in all points according to the Statute of 1 Eliz. for first it begins presently upon the making of it: Secondly, the ancient rent is reserved payable yearly during the term; for although here be an old Lease in esse, yet the Rent reserved upon the second Lease is payable during the second term, for payable is a word of power and not of action, as 1 H. 4. 1. 2. 3. Lord, Vescire, and Tenant, the Vescire gives the Vescivalty in tail, rendzing Rent, it is a good Rent, and well reserved, although here be not a present distresse; yet it may be the Tenancy will escheat, and then the Donor shall distrein for all the Arrearages: And so the Rent is payable by possibility. And 10 E. 4. 4. A leaseth for years, and afterwards grants the Reversion to a stranger, if the Beasts of the stranger come upon the Lands during the term; A may distrein for the Arrearages incurred, and if he happen seisin, he shall have an

Lease within
1 Eliz. and
32. 7. 8. made
by Bishop

Alize during the continuance of the first term. And he cited a Case lately adjudged in the Exchequer. Lessor entred upon Lessee for years, and made a Freshment rendering Rent with clause of Re-entry, the Lessee re-entered, claiming his Term, and afterwards during the said Term for years, the Rent reserved upon the Freshment upon demand of it is behind: Now hath the Lessor regained the Reversion: And so a Rent may be demanded although not distreinable. And all that was affirmed by Egerton Sollicitor General: And see the words of the Statute of 32 H 8. cap. 28. Rent reserved yearly during the said Lease due and payable to the Lessor, &c. such Rent, &c. and yet by the said Statute, such Leases may be good, although there be a former interest for years in being, if the same shall be expired, surrendered, or ended within one year after the making of such new lease, and so not expressly payable in rei veritate, annually during the Term.

Pascb. 29. Eliz. in the Kings Bench.

LXXXVIII. Bonefant and Sir Rich. Greenfeilds Case.

Sale of Lands
by the Execu-
tors of the
Devisor:

Bonefant brought Trespass against Sir Rich. Greenfeild, and upon the general issue, this special matter was found: Tremagie was seised of a Mannor, whereof the place where, &c. was parcel, in his Demesne as of Fee, and by his Will devised the same to his four Executors, and further willed, that his said Executors should sell the same to Sir John Sainleger for the payment of his debts, if the said Sir John would pay for it one thousand one hundred pounds at such a day, and dyed, Sir John did not pay the money at the day. One of the Executors refused Administration of the will, the other three entered into the Land and sold it to the Defendant for so much as it could be sold, and in convenient time. It was moved, that the sale was not good, for they have not their authority as Executors, but as Devisees, and then when one refuseth, the other cannot sell by 21 H 3. Cestuy que use Wills, that his Executors shall alien his Land, and dyeth, although the Executors refuse the Administration, yet they may alien the Land. 19 H 8. 11. 15 H 7. 12. Egerton Sollicitor argued, that the sale is good by the Common Law, and also by the Statute 49 E 3. 16. 17. Devise, that his Executors shall sell his Land, and dyeth, and one of the Executors dyeth, another refuseth, the third may sell well enough, and such sale is good. See Br. Devise 31. 30 H 8. 39 E 3. Br. Alize 356. And he put a difference where an Authority is given to many by one deed, there all ought to joyn; contrary, where the Authority is given by will; And if all the Executors severally sell the Lands to several persons, such sale which is most beneficial for the Testator shall stand, and take effect: And here it is found by verdict, that one of the Executors, recusavit onus Testamenti, Ergo, he refused to take by the Devise, for it was devised unto him to the intent to sell; therefore if he refuseth to sell, he doth refuse to take, and so it is not necessary that he who refuseth joyn in the sale, and although we are not within the express words of the Statute, yet we are within the sense and meaning of it. And afterwards it was adjudged, that the Condition, for the manner of it, was good.

Pascb. 29 Eliz. In the Common Pleas.

LXXIX. Gamock, and Cliffs Case.

Ejectione firmarum
firma:

Ejectione firmarum was brought by Gamock against Cliffe of the Mannor of Hockley, in the County of Essex, and upon the evidence the case was:

That the King and Queen, Philip and Mary, seised of the said Manors of Hockley, leased the same to Edmund Terrell for years, exceptis & Reservatis grossis arboribus super premissis crescentibus & existentibus, Proviso, that if Conditions, the said Lessee his Executors, or Assignees shall do any voluntary waste in any of the Premises before demised, that then the said demise shall be void and accounted none in Law, the said King and Queen after that lease grant the Reversion to the Lord Rich & his Heirs, the Lessee cuts down certain great Trees, which at the time of the demise were not great, but little Trees, but after tractu temporis, became great, at the time of the cutting down were great, upon whom the Lady Rich wife & Willdow of the said Lord Rich, being Tenant in Dower, the said Manors (inter alia) being assigned to her in Dower, did enter, for the condition broken: It was moved, If the exception did extend to the trees which at the time of the demise were but little trees, but afterwards at the time of the cutting of them down were become great; so if the exception do extend to such Trees, then upon the matter they were not demised, and if so, then waste cannot be assigned in the cutting down of them, and then by the cutting of them, the condition is not broken: But if the exception shall be construed to extend to such Trees only which were great, Tempore dimissionis, then those Trees in which, &c. are demised, and by the cutting down of them, the condition is broken. And the Lord Anderson was of opinion, that the exception did extend to Trees, which at any time, dimissionis predicti, became great, although at the time of the demise they were but little, so as upon the matter, such Trees Where the Tenant in were never demised, and so the condition doth not extend to them; otherwise it Dower shall should be if the words had been modo crescentibus & existentibus: Another mat, take advan- tage of a con- by the Law, not by the party, and so not privity, nor as Assignee could dition. enter for the condition broken: And the Court was clear of opinion, that because, that the words of the condition are, "Quando dimissio predicti, erit vacua, &c. and no clause of re-entry is reserved, so that privity is not requisite, the Lady Rich, shall take advantage of the condition, 11 H. 17. Where the words of a Lease are, that upon the not going to Rome, that the Lease shall cease, it was holden that the Grantee of the Reversion by the common Law should take advantage of such a condition, contrary where the con- dition is conceived in words of reentry, 21 H. 7. 12. It was moved further, that here is not any voluntary waste in the Lessee as to the condition, because done by a stranger, and not by the Lessee himselfe, and so that the condition is not broken, only the Lessee is subject unto an Action of Waste; otherwise, if the Lessee had expressly commanded the Tenant to cut them down, or had given to him express authority: The sale was, All his Woods growing, &c.

Pasch. 29. Eliz. In the common Pleas.

LXXX. Gill and Harewoods Case.

Gill brought an Action upon the Case against Harewood, and declared, that Assumpsit, where the Defendant was indebted to the Plaintiff in such a sum, and shewed how; the Defendant in consideration that the Plaintiff, per parum tempus deferret diem solutionis, &c. did promise to pay, &c. And, upon Non Assumpsit pleaded, it was found for the Plaintiff, and it was moved in arrest of Judgement, that here is not any consideration, for no time is limited for the appearance, but generally, parum tempus, which cannot be any comodi- ty to the Defendant, for the same may be, but punctum temporis, &c. But the exception was not allowed, for the Debt in it selfe is a sufficient considera- tion.

to younesse and age to a child, yeld ons qulidt straunge and grise 20000
aswales & appreys. Item of 10000 brought of annall rente whiche
is full. **LXX XI. Pasch. 29. Eliz.** In the common Pleas.

Fenner Serjeant would have drawn a Fine which was by Dedimus Potessta-
ment, and the Fine was to two, and there heires, but the Court would not
receive such Fine for the incertainty of the Inheritance, which alwayes in
case of Fine ought to be reposed in a person certain, and not left to uncertain-
ty of the Survivor, & the said Serjeant prayed presently, that the said Fine be
received at the perill of the Commissee, but the same was denied him by the
whole Court.

Mich. 29. and 30. Eliz. In *Communi Banco*.

LXXXII. Mascalls Case.

Covenant.

Mascall leased a House to A for yeares by Indenture, by which A cove-
nanted with Mascall to repaire the House Leased, and that it should be
lawful for Mascall his Heires and Assignes to enter into the House to see in
what plight soe matter of Reparation the said House stood, and if upon any
such view, any default shoule be found in the not repairing of it, and therfore
warning be given to A, his Executors, &c. Then within four moneths after
such warning, such default shoule be amended: the House in the default of
the Lessee became rynous: Mascall granted the Reversion over in Fee to
one Carre, who upon view of the House gave warning to A of the default, &c.
which is not repayed, upon which Carre, as Assignee of Mascall, brought an
Action of Covenant against A. It was moved by Fenner Serjeant, that the
Action did not lye, because the House became rynous before his interest in the
Reversion; But the opinion of the whole Court was against him, for that
the Action is not conceived upon the rynous estate of the House, or for the
committting of Waste, but for the not repairing of it within the time appoin-
ted by the Covenant, after the warning, so as it is not materiall within what
time the House became rynous, but within what time the warning was gi-
ven, and the default of the Reparation did happen.

LXXXIII. Mich 29 & 30. Eliz. In *Communi Banco*.

Dower.

In a Writ of Dower, brought by a Woman of the third part of certaine
Lands, &c. The Tenant pleaded; That the Lands of which Dower is de-
manded, are of the nature of Gavel-kind, and that the custome of such Land
is, that Dower ought to be demanded of the moyety of it, and not of the third
part, upon which the Demandant did demur: And the opinion of Windham
and Anderson Justices was; That such a Woman of such Land might at her
pleasure demand her Dower either according to the Custome, or according to
the common Law; for by Anderson, the common Law was before the Cu-
stome, quod quare, and by Windham, if the Demandant here recover her
Dower according to the common Law, yet if shee taketh another Husband,
shee shall lose her Dower as if shee had been endowed according to the Cust-
ome, Coke, an Apprentice of the Inner Temple being at the Bar, when this
Case was moved, saide unto Serjeant Shuttleworth, that the Case had been ad-
judged against the Demandant, and Scot Preignochory did affirme, that the
Lord Dyer was of opinion, that the Woman ought to be endowed according
to the Custome, and not otherwise, And Sayer one of the Clerks of Nelson,
cheifs

cheife Preignolhozy said, that it was adjudged accordingly, 16. Eliz. and that the Case was betwixt Gelbrand Demandant, and Hunt Tenant.

Mich. 29. Eliz. in the Common Pleas.

LXXXIV. Beverlie and Cornwals Case.

Beverlie brought a Quare Impedit against Cornwall, and had Judgement to Quare Imped. recovered upon a Demurrer in Law: which see Mich. 28. and 29. Eliz. And now the Queen brought a Scire facias upon the matter. That the said Beverly after the said Judgement was out-laided in an Action of Trespass at Out-lawry the sume of 1 S, and upon that a Scire facias issued, ad respondendum Quare Impedit. &c Domina Regina, shold not have execution of the Judgement aforesaid, by reason of the Out-lawry aforesaid; and declares in all as aforesaid: And further, that the said Cornwall had resigned. Upon which Beverly did demur in Law. And this Term it was argued by Puckering Serjeant for the Queen, that by that Out-lawry the Interest to present is transferred to the Queen. Which see 5 H 5. 3. Tenant at will of a Mannor, to which an Abbotsom is appendant is out-laided in an Action of Trespass; the Church voided; by award of the Court it belongs to the King to present: And see 8 R 2 scil. Quare Imped. 200. A seised of an Abbotsom, the Church becomes void. A is out-laided in a personal Action; the King shall have a Quare Impedit in that Case. And as to the Exception taken, because the Out-lawry is not sufficiently layed in the Writ, but only generally, viz. ut lagatus in Com. Lincoln, ad sectan. I S in plito transgressionis, without shewing the Out-lawry at large, there is a difference, where an Out-lawry is pleaded by way of barre, and disability of the person, &c. and where it is set down in a Writ, for a Writ ought shortly and compendiously to comprehend the cause of the Action, especially judicial Writs which are not tried to any sum certain, especially because that the Out-lawry set forth in the Writ is a Record of the same Court: For the percase of the Scire facias is, pro ut per recordam hic in curia plenus appears: And that Record being in the Court, the party cannot plead, Nisi tali record, as if the Record had been in any other Court: But he ought to demand Dyer of of the Record: Which vide 3 H 7. 24. Walmsley Serjeant contrary. By Out-lawry in an Action personal, the King cannot have Land, but only take the profits of it, 9 H 6. 20. 21 H 7. 7. And as our cas is, nothing doth accrue to the Queen by this Out-lawry, for the Queen her self is seised of the Abbotsom, because she, usurpando presentavit, and her Clark admitted; and although Beverly hath recovered in a Quare Impedit against the Presentee of the Queen, yet because he is not removed by a Writ to the Bishop, the Queen continues Patron, and nothing remains in Beverly, that may be forfeited; But Rhodes and Periam contrary, for by Periam if after such Recovery the Incumbent dyeth, the Patron shall present, for by the Judgement in the Quare Impedit for Beverly, the Patronage is revesled in him without any other exception: And by Rhodes, if after such Judgement the Patron dyeth, his Executors shall have a Writ to the Bishop. And by Walmsley, the Scire facias doth not lie for the Queen; for that Writ always rims in privity of the Record upon which it is grounded, to which Record the Queen is a stranger, and by Out-lawry in an Action personal no Action real shall escheat, and therefore this Scire facias being in the nature of a Quare Impedit upon which it is grounded, which is a real Action, or at least a mixt shall not be forfeited; and also it shall be absurd to grant now a Writ to the Bishop for the Queen; whereas Judgement was given against the Queen, as in our case it hath been. And in no Case the Judges shall respect the title of the Queen, being a stranger to the Writ: But where a title for the Queen doth appear upon

upon the pleading, or otherwise within the Record, 11 H 4. 224. by Hankford. If a clear title for the King be confessed by the parties upon pleading, a ~~Writ~~ to the Bishop shall issue for the King; so if such matter appear in Evidence, &c. the Land in question is seizable into the Kings hands. See 9 H 7. 9. 16 H 7. 12. 21 E 4. 3. by Choke and F N B 38. e. In a Quare Impedit betwixt two strangers if title doth appear to the Court for the King, a ~~Writ~~ to the Bishop shall issue forth for the King; but in our Case nothing is within the Record to intitle the Queen, but all the matter upon which a ~~Writ~~ to the Bishop is prayed for the Queen is out of the Record, and a foreign thing. And as to the Dut-lawry, he conceived it is not sufficiently alleged; so he ought to have made mention of the Exigent and of all the proceeding upon it, and the Judgment of the Coronors, and sof defect of that no title is given to the Queen; and of that opinion was the Lord Anderson, and that it ought to be set forth in the ~~Writ~~ in what Term the said Beverly was out-lawed, and the Number Roll also, so that if Beverly had demanded Dyer of the Record, the Court might know it: And by Nelson their Preignothory, the Term in which the Dut-lawry was, ought to be comprised in the Scire facias. Vide Book Entries 485. where in a Quare Impedit for the Roy upon such a title, the King shewed in his Court, that A was seized of such an Abbouson, and granted the next Abundance to B, and that afterwards one C impleaded the said B in a ~~Writ~~ of Action in such a Court, where Nihil was returned upon the summons, upon which issued forth a Capias, upon which is returned Non est inventus, &c. upon which an Exigent, upon which the Sheriff did return, quod ad com. tener. &c. & ad iii. comitat. tunc prox. praecedent. the said B exactus suit, & non comparuit, & quia ad nullum corundam comitat. apartuit, ut legatus fuit, and after the Church voideth, and that by reason thereof it did belong to the King to present: vide ibid 196. accordingly. And as to the Scire facias all the Judges agreed, that upon the matter the ~~Writ~~ lay well enough: And it is good discre-
tion in the Court to grant such a ~~Writ~~: And by Rhodes, If two Coparcen-
ters of an Abbouson make composition to present by turns, and afterwards one of them dyeth, her Heir within age, and Ward to the King: The Church voideth, and the King is disturbed in his presentation, he shall have a Scire facias upon such composition, notwithstanding that he be a stranger to it: See F N B 34 H. And by all the Justices, if the recover in Debt upon a simple con-
tract, and before execution the Plaintiff is out-lawed in an Action personal, the King shall sue execution: And see 37 H 6. 26. Where in Debt upon an Obligation it was surmised to the Court, that the Plaintiff was cut-
lawed: And the Kings Attorney prayed delivery of the Obligation, &c.

Mich. 29 and 30 Eliz. In Communi Banco.

L X X X V. Moile and the Earle of Warwicks Case.

AQuare Impedit was brought by Walter Moile against Ambrose Earl of Warwick, and the Archbisshop of Canterbury. And now came the Ser-
jeants of the Queen, and shewed an Office, to entitle the Queen to have a ~~Writ~~ to the Bishop, containing such matter, viz. That one Guilford was sei-
zed of the Manor of D, to which the Abbouson of the Church was appendant,
and that Manor was holden in cheise by Knights service, and that Guilford
and his wife levied a Fine therof to the use of themselves for their
lives, the remainder over in tail to their eldest Son, and that Guilford
is dead, but who is his next Heir, ignorant: And it was shewed by
the Council of the other side, that the truth of the Case was, that
the said Guilford was seized of the said Manor in the right of his wife,
and so levied the Fines, in which Case the said conveyance is not within
the

the Statute of 32 H 8. for it was for the advancement of the Husband, not of the Wife, which Anderson granted. Vide Dyer 19 Eliz. 354. Caverlies Case, but that is not in the Office: And it was moved at the Barre, that the Office is imperfect, because no Heir is found. But Anderson, the Office is sufficient for the King to seise, although it be insufficient for the Heir, &c. And it was agreed by the whole Court, Office to. that the Court ought not to receive the Office, although one would al- firm upon oath, that it is the very Office, but it ought to be brought in under the Great Seal of England; and also the Court shall not receive it without a Writ; and yet Nelson Pregnothoroy said, that the Statute of Huy and Cry of Winchester was brought into the Court without a Writ under the Great Seal, and that was out of the Lawyer: And in that Case also the Justices held, that if a Record be pleaded in the same Court where it abides, the other party against whom it is pleaded may plead Nul tiel Record, as if the said Rec- cord had been remaining in another Court, which all the Pregnothories deny- ed, and that always it had been used to the contrary. At another day the Case was moved again. The Plaintiff in the Quare Impedit counted, that Richard Guilford was seised of the said Mannor, &c. in the right of Bennet his Wife, and so seised, they both levied a Fine thereof to a stranger, Sur Co- nulsans de droit come ceo, who rended it to the Husband and Wife for their lives, the remainder to the Heires of the body of the Husband, the remainder to the right Heires of the Husband; and they so being seised, the Husband alone levied a Fine to a stranger, Sur Conulsans de droit come ceo, &c. and by the same Fine the Consee rendez to the Husband and Wife in tail, the remainder to the Heires of the body of the Husband, the remainder to the right Heires of the Husband, the Husband dyed seised, the Wife entred and leased the said Mannor to the Plaintiff, and then the Church did become void: And now the Queens Servants came and shewes unto the Court an Office, which came in by Mitisus: In which Writ the perclus is, Mandamus vobis quod in- spectis, &c. pro nobis fieri facias quod solum leges & consuetudinem Regni nostri Anglia faciend. Statuetis; And the Office did purport, that the said Richard was seised of the said Mannor, and held the same of the Queen, as of her Castle of Dover, by Knights service in chief, and levied the Fine, ut supra, and that the said Richard dyed, sed quis sit propinquior haeres dict. Ric. penitus ignorant; and upon that Office prayed a Writ to the Bishop for the Queen: And two Exceptions were taken to the Office, First because it is not found by the said Office that the said Richard dyed seised, in which Case it is may be for any thing that appeareth in the Office, that the said Richard after the said Fine had conveyed his estate in the said Lands unto others, or that he was disseised, &c. See 3 H 6. 5. If it be not found of what estate the Tenant of the King dyed seised, the Office is insufficient. But see there by Martin, that such an Office is good enough for the King, but not for the Heir to sue his Livery upon it. And by Anderson, Periam, and Rhodes, that defect in the Office is supplied by the Count, for there it is expressly alledged, that the said Richard dyed seised. Secondly, because no Heir is found by the said Of- fice. To which it was said by the Lord Anderson, that peradventure at the Common Law the same had been a material Exception. But we ought to respect the Statutes of 32 and 34 H 8. of Wills: And therefore as to the Wife the Queen is entitled to Primer seisin, because the conveyance was made for her advancement: And by Windham, the Queen in this Case shall not have Primer seisin, for by the Statute the Queen shall not have Primer se- sin, but in such Case, where, if no conveyance had been made, the Queen should have had Primer seisin, but in this Case for any thing that appears before us, if this conveyance had not been made the Queen should not have had Primer se- sin, forasmuch as no Heir is found, & if he dyed without Heir there is no Primer seisin, because there is not any in rerum natura to sue livery. Rhodes, Periam

A Record not
to be brought
into Court
without a
Writ.

and Anderson contrary; Admitting that Richard dyed without Heire, the Queen shall have Primer Seisin against the wife of Richard, notwithstanding the escheat. Walmsley herseant, If the Tenant of the King by Knights service in cheife dyeth seised of other Lands holden of a common person by Knights service, without Heires, the King shall not have Primer Seisin of such Lands holden of a Subsire, which Windham granted: But by Anderson the Lordis put to sue an Ouster le mayne of the Land holden of him. And afterwarde exception was taken to the Count, because the plaintiff hath not averred the use of the Tenant in tail, that is, of Bennet the wife of Richard, to whom the Land was entailed by the second fine: But that exception was disallowed by the whole Court, and a difference put by Anderson. Where a man pleads the grant of an Advowson in gross by Tenant in tail, in such case the use of the Tenant in tail ought to be averred, soz by his death the grant easeth. But where a man pleads the lease of Tenant in tail of a Hammor with an Advowson appendant, in such case such averment is not necessary: So accordingly Smith and Stapletons Case, 15 Eliz. 431. And here it was moved, if, in as much as by the first fine an estate for life was rendered to the wife, and by the second fine, in which she did not joyn, an estate tail was committed unto her, and now when the Husband dyeth if he shall be remitted to her estate for life, which Windham granted, soz that was her lawful estate, and the second estate tortious: But by Rhodes, Periam, and Anderson the wife is at liberty to make her election which of the two estates she will have. And as to the writ to the Bishop for the Queen, the Court was clear of opinion, that it ought not to be granted upon this matter: But all the question was, if Regina inconsulta, the Court would or ought to proceed: And it was holden clearly by the whole Court, that the tenure alledged, modo & forma, could not be a tenure in chief, soz it is said, that the Land was holden of the King, as of the Castle of Dover, in Capite.

L XXXVI. Mich. 29. and 30. Eliz. In Communi Banco, Inst.
Pas. 28. Eliz. Rot. 602.

Wart.

WIt was brought by F and his wife against Pepy, and counted, that the said Pepy was seised, and enfeoffed certain persons to the use of himself for life, and afterwards to the use of the wife of the Plaintiff and her Heires. The Defendant pleaded, that the said Feofment was unto the use of himself and his Heires in fee, &c. without that, that it was to the uses in the Count, upon which they were at issue: And it was found by verdict, that the said Feofment was unto the uses contained in the Count: But the Jury further found, that the estate of the Defendant by the limitation of the use was privileged with the impunity for want, that is to say, without impeachment of want. And it was moved, if upon this verdict the Plaintiff shall have Judgement: And Anderson and Rhodes Justices, he shall, soz the matter in issue is found for the Plaintiff, and that is the Feofment to the uses contained in the Count: and this impunity of want is a foreign matter not within the charge of the Jury, and therefore the traverse of it but matter of surplusage. As if I plead the Feofment of I.S. To which the other pleads, that he did not enfeoffe, and the Jury find a conditional Feofment, the Court shall not respect the finding of the condition, soz it was not in issue, and no advantage shall ever be had of such a liberty if it be not pleaded. 30 H 8. Dyer 41. In Dover the Tenant pleaded, No unquam seisi que Dover; the Tenant pleaded, that before the coverture of the Demandant, one A was seised of the Landes, of which Dover is demanded in tail, who made a Feofment to a stranger, and took the Demandant to wife, and took back an estate in Fee, and dyed seised, having issue inheritable: Now although upon the truth of the matter she is not

not dowlable de jure, yet when the parties are at issue upon a point certain, no soverign or strange matter not in question betwixt the parties shall be respect-
ed in the poynt of the Judgement. But if the Defendant had pleaded it in
barre, he might have forclosed the Demandant of her Dolour. Vide 38. H. 6.
27. 47 E. 3. 19. In a Precipe quod reddat in the default of the Tenant
one came and shewed how the Tenant who made default was but
Tenant for life of the Lands in demand, the reversion in Fee to himself,
and prayed to be received. The Demandant did counter plead the receipt,
saying, the Defendant had fee, upon which issue was joyned. And it was
found, that neither the tenant, nor he which prayed to be received, had any thing
in the Land; In that case the Court did not regard the matter which was su-
perfluous in the verdict, for they were at issue upon a point certain, that is, why-
ther the Tenant was lesseid in Fee, for it was confessed of both sides, that he had
an estate for life; and with that matter the Jury was not charged, and they
are not to enquire of it, and so it was found against the Demandant, for which
causle the Receipt was granted. 7 H. 6. 20. The parties were at issue upon a
dying lease, which is found by verdict, but the Jury further find, that the other
party make continual claim; this continual claim shall not be regarded in the
point of the Judgement, because it was not pleaded in avoidance of the descent.
Windh. Justice contrary. Forasmuch as it appeareth unto us upon the verdict,
that the Plaintiff hath not cause of Action, and therfore he shall not have
Judgement; As in Detinue, The Plaintiff counteth of a bailment by his own
hand; the Defendant pleadeth, that he doth not detain, &c. the Jury find the
Detinue, but upon a bailment by another hand: In this case, notwithstanding
ing that the Detinue be found, yet the Plaintiff shall not have Judgement.
But Rhodes, Periam, and Anderson in the principal case were of opinion, No advantage
Judgement should be given for the Plaintiff, for in no case the party shall for want shall
have advantage of such a Liberty of impunitie of Want, if he do not plead it, be taken,
where the
same is not
pleaded
though found
by verdict,
Judgement.

Mich. 29. & 30. E. 12. In Communi Banco,

L X X X V I I . Bracebridge & Baskerville's Case.

A n Action of Debt is brought against three Executors, one of them pleads
in Bar a Recovery against himself in the Kings Bench: The other two plead plene administr. Against the first plea the Plaintiff did averre to
this, and upon the second plea they are at issue: The first issue is found for
the Plaintiff, and as to the other plea, it was found, that the Defendants have
in their hands thirty pounds of the goods of their Testator not administered.
Note, the debt in demand was one hundred pounds, upon which the Plaintiff
had Judgement to recover the goods of the Testator, and thereupon had exec-
ution. Now the Plaintiff brought a Scire facias against the said Executors,
supposing that many other goods of the Testator have come unto their hands
after the Judgement, and prayed execution thereof: upon which the Defendant
did demurre in Law. Vide 21 H. 6. 40. 41. In debt against Executors of sev-
eral marks, the Defendant pleaded, that he had fully administered, and it was
found, that the Defendant, at the day of the suit brought, had of the goods of
the dead twenty marks and no more, and gave damages five marks. There-
fore the Plaintiff had Judgement for the twenty marks of the goods of the dead,
and the five marks of their own goods: And as to the other twenty marks,
that the Plaintiff should be amerced: 33 H. 6. 24. Where Executors plead,
that they hav: nothing in their hands, which is found accordingly: After-
wards

wards goods of the Testator came to the hands of the Executors : Now the Plaintiff upon a summe shall have out of the same Record a Scire facias to have execution of the said goods : But see 4 H 6. 4. contrary, for there it is said, that upon the matter the original is determined, and so no Record, upon which a Scire facias can be grounded : And see Fizb. abridging the Case Scire facias, 25. by the verdict and the Judgement the Original is abated : Vide 7 E 4. 9. by Moile, according to 3, H 6. and 14 E 3. 9. by Belknap. And the Lord Anderson demanded of the Prognothorizes the manner of the entry of the Judgements given in such Cases, who said, that their Entry is in this manner: (i. e.) Quod queras recuperet, that which is expressly found by the verdict, but nothing of the residue, for of that no mention is made at all. And the Court seemed to be of opinion, that whereupon nothing remaining in their hands, pleaded, It is found that some part of the sum in demand is in the hands of the Executors; there the Plaintiff upon a summe of goods come to the hands of the Executors shall have a Scire facias; contrary, where upon such issue, it is found fully for the Defendants, that they have nothing in their hands.

Micb. 29. and 30. Eliz. In Commissarii Banco.

LXXXVIII. Fordleys Case.

Ordley brought debt upon an Obligation, the Condition was, that if the Defendant, viz. the Obligor deliver unto the Plaintiff the Oblige, at such a day and place, twenty pounds as ten Pinte, at the then choice of the Obliger, &c. that then, &c. The Court was clear of opinion, that the Defendant in pleading the performance thereof ought to tender to the Plaintiff as well the twenty pounds as the ten Pinte, and for default thereof Judgement was given against the Defendant. See the Number Roll T 29 Eliz. 1. part. 324. vide 14 E 4. 4. b.

Micb. 29. and 30. Eliz. In Commissarii Banco.

LXXXIX. Barker and Pigott's Case.

Eward Barker brought Debt against Rich. Pigott Executor of the Will of E, Executor of the Will of R. The Defendant pleaded, that he had fully administered the goods of his Testator E, upon which they were at issue, which was found so; the Plaintiff. And it was moved in arrest of Judgement, that here is not any issue joined, which answers to the Action, for the Action is brought against the Defendant in the quality of the Executor of an Executor, and the verdict extends to the Defendant, but is Executor of the said E, for it is found by it, that the Defendant hath fully administered the goods of his Testator, without any enquiry of the Administration of the goods of the first Testator R, in which capacity the Defendant is charged. So as here the Will charges the Defendant in the quality of an Executor of an Executor; and in respect of the first Testator, and the issue and verdict both concern the last Testator: And the whole Court was clear of opinion, that although that now after verdict Recouer be saved, and no Judgement shall be given upon it; yet here the Court shall give Judgement as upon a Nil sic dicte, in which case the Execution of the Judgement shall not fall upon the goods of the last Testator according to the verdict, but shall follow the nature of the Action which was brought against the Defendant as Executor of an Executor.

Execution must follow the nature of the Action.

Mich. 29 and 30. *Eliz. In Communi Banco.*

X C. Thacker and Elmers Case.

Thacker recovered in an Assize of Novel disseisin against Elmer constell Lands in Hackney, and had execution : Elmer entered upon Thacker and ousted him, and Redisseised him. Thacker re-entered, and afterwards brought a Redisseisin ; And it was moved, whether Thacker against his Entry might have a Redisseisin : And the opinion of the whole Court was, that he might well maintain the *Writ*, for he is not thereby to recover any Land ; but the Defendant of that Redisseisin being convicted, shall be fined and imprisoned, and render double damages : Vide Book Entries 502. the Judgement in a Redisseisin is, Quod recuperet seisinam suam of the Land.

Re-disseisin,
and the Judge-
ment in it.

Mich. 9 and 30 *Eliz. In Communi Banco.*

X C I. Blaunchflower and Fryes Case.

Blanchflower brought debt upon a Bond against Elinor Frye, as Executrix of one Andrew Frye her late Husband, who pleaded, that this *Writ* was Deb't brought 9. July, 27 Eliz. Whereof she had notice the first of October after, with in which time one Lawrence had brought an Original *Writ* against the said Elinor as Administratrix of the said Andrew : And after the bringing of the *Writ*, the Bishop of Bath and Wells committed Administration of the goods of the said Andrew to the said Elinor, which Elinor confessed the Action, upon which Judgement was given for the laid Lawrence, beyond which she had no goods, upon which the now Plaintiff did demur in Law. And by Anderson, the Recovery pleaded in barre shall not bind the Plaintiff, because it appear eth upon the plea of the Defendant, that the Administration was committed after the *Writ* purchased, which matter if the Defendant had pleaded, Law Administra-
tion could not have had Judgement to recover. As where there are three Executors, and debt is brought against two of them, if they do not plead that pendant the matter in abatement of the *Writ*, but plead, &c. or confess the Action, so that Writ the Plaintiff hath Judgement to Recover, that Recovery shall not bind a stranger who hath cause of Action against them, but that he may well satisfie it, and yet it was said that in such Case, the Defendant by the obtaining of the Letters of Administration had made the *Writ* good against her, vi. 13 H. 4. Fitz Executors, 118. Administration committed before the *Writ* purchased shall abate the *Writ* brought against the Defendant as Executor, but such Administration obtained, depending the *Writ*, shall not abate it, vi. 21 H. 6. 8. 2 R. 3. 20. Another matter was moved by Anderson, because the Defendant had pleaded a Recovery by confession had against her without Averment that it was a true Debt, in which Case Cobin is presumed, Windham and Perriam were of opinion, that the matter of Cobin ought to come in on the part of the Plaintiff, which Anderson denied, vi. 9 E. 4. 13, 14. 33. the Cardinals Case.

In Communi Banco Intrat. Mich. 26. & 27. Eliz. Nov. 12.

X C I I. Basset and Kernes Case.

Basset the Executor of Morris Sheppard brought debt upon a Bond against Kerne, the Case was : That Kerne was bound to Morris in an Obligation Debt by Exe-
cutors.

Election.

upon Condition, that the said Kerne shoulde pay to the said Morris his Green, tozz, &c. at the choice and election of the said Morris, within a moneth after the death of the Lady Kerne, thirty pounds, or twenty Nine, to which the Defendant pleaded that the Plaintiff within the moneth after the death, &c. did not make any choice or election, upon which the Plaintiff did demur in Law: And the Court was clear of opinion, that it was a good Plea in Bar, for the Obligor is not bounden to make a tender of both, viz. of the mony and the Nine; but the Obligee himselfe is bounden at his perill to make election within the time limited: As if I be bounden to you, to make unto you such further assurance within such a time by Fine or Fecomment as you shall choose, it behoveth you to make election of your assurance, Fine, or Fecomment, and in the principall Case, the election of the Plaintiff ought to precede the tender of the Defendant: vi. the Lord Lilles Case, 18 E 4. 15. 17. 20. 21. Where the Defendant was bound to the said Lord to shew his Evidences touching such a House to the said Lord or his Councill, the election was to the Defendant to whom he would shew them, and there by Brian, if I be bound to you to marry your Daughter, or to go to Yorke on your Busynesses upon request before you require me to marry your Daughter I may do it, or go to Yorke, which Coke granted, vi. 13 E. 4. 4. where the condition is in the disjunctive, before the day of performance the election is to the Defendant, but if at the day he make default, the Election is to the Obligee; vi. 9 E. 4. 36, 37. And by Windham, if I be bounden unto you in an Obligation of ten pounds, to pay to you such a day ten pounds in Calv, or Silver, if you do not make your election before the day, yet the duty remaines payable, for the thing to be paid is parcell of the penalty, quod fuit concessum; And as to the principall Case, the Court was clear of opinion, that upon this matter the Plaintiff should be barred: See before this Terme, Forteheys Case.

Mich. 29 & 30. Eliz. In Communi Bisco.

Habeas Corpus.

X.CII. Searches Case.

AHABEAS CORPUS issued forth out of the Court of Common Pleas, to the Steward & Marshall of the House, &c. for one Wil. Search, which was returned in this manner, viz. quod Domina Regina per litteras suas Patentibus suscepit, in protectionem suam regiam, Johannem Mabbe, and his sureties, and of her further grace by the said Letters, voluit, that if any person shoulde arrest, or cause to be arrested the said John Mabbe or any of his sureties, that then the Marshall of her House, or his lawfull Deputy might arrest every such person, and detaine them in Prison untill such person shoulde answer before the Privy Council for the contempt; And that the said William Search caused one John Preston one of the said sureties of the said John Mabbe to be arrested, &c. And upon that returne, the said William Search was discharged; And also because that after the said discharge the parties caused the said William Search to be arrested againe for the same cause, that is by colour of the said protection; An Attachment was granted against them.

Note, that the same Terme, Mich. 29. and 30. Eliz. Another Habeas Corpus was directed to the Steward and Marshal of the Marshalsey, Habeas corpus for one Howell, who made returne, that the said Howell was committed to his custody, per mandatum Francisci Welsingham militis Principalis Secretarii, & unius de privato concilio Dominus Reginz, and that returne was by the Court holden insufficient, because the cause upon which he was committed, was not set down in the returne; and therefore day was given to

amend the returne, and now they returned the ~~Bill~~ in this manner, &c. infra nominatos Johannes Howell concessus fuit, &c. ex sententia & mandato totius concillii privati Domini Reginae; Ita quod corpus ejus habere non possumus, &c. And that returne was also holden by the Court to be insufficient soz (by whatsoever person, or by what meanes soever he was committed) the conclusion of the returne ought to be, Corpus tamen ejus paratum habeo, and if it shall seeme good to the Court, that the Prisoner shall have his Priviledge, and shall be dismis't, he shall be discharged, but if not, then he shall be remanded, and the Court took a difference, where one is committed by one of the Privy Councill, for in such case the cause of the committing ought to be set down in the returne; But contrary where the party is committed by the whole Council, there no cause need to be alleadged.

Mich 29 and 30. Eliz. In Communi Banco.

XCV. Bret and Audars Case.

Bret brought Debt upon an Obligation against Audar, the Condition of Debts upon which Obligation was, that the Defendant should stand to the Award, Bond to performe. And the Arbitrator awarded, that the Defendant should pay unto the Plaintiff ten pounds, without naming day or place; And as to that the Defendant pleaded, that he was alwayes ready, and yet is, &c. without shewing any tender: And it was moved, That although that would have been a good Plea in debt upon an Arbitrament, as the Case is, 7 H. 4. 97. See 21 E. 4. 40, 41, 42. Yet now by the Obligation and the Condition of it, the sum is payable in another manner then it was before, see the pleading of the Case, 21 E. 4. In Debt upon an Obligation to performe the Award; That the award was made between the Termes of Pasch. and Trinity, and he the eighth of September after, tendered the twenty pounds, and the Plaintiff refused it. And the Lord Anderson put a difference between the Case, in 23 H. 6. 57; Tender. And the Case at the Bar, soz in our Case the Obligation doth precede the duty which acometh by the Award subsequent, but in the former Case the duty did precede the Obligation which was made for the further assurance of the duty: And here the Defendant ought to have pleaded the tender, and see 14 E. 4. 4. A is bound unto B, that, where he hath granted to the said B a Rent charge out of such Land, now if the said B shall enjoy the said Rent according to the forme and effect of the said Grant, that then, &c. there he needs not to plead any tender, for the Rent is not payable in other manner then it was before, contrary if the Condition had been for the payment of the Annuity. And of that opinion was the whole Court, that he ought to have pleaded a tender. Another matter of the Award was, that the said Audar shoulde yeild up, sue render, and relinquish to the Plaintiff all such Houses and Tenements which he had in his possession, by reason of the custody of the said Plaintiff: As to that the Defendant pleaded, that he had yeilded up, &c. All such Houses, &c. generally without shewing which in certaine; And for that cause the Court was clear of opinion, that the Plea was not good; which see 9 E. 4. 16. If I be bounden upon condition to enlesse the Oblige of all Lands, Tenements, which were to I S, in pleading the performance of that Condition, I ought to shew what Lands and Tenements in certain, for they passe out of me by the Hoolment; See also 12 H. 8. 7. 13 H. 8. 19. Another point of the Award was, That the said Audar should acquit and discharge, and save harmles the ^{Non damifica-} Plaintiff of such an Obligation, to which the Defendant pleads, that Quere-^{tus, generally,} tens non suit damificatus, and that Plea was holden insufficient, for he might to have shewed, how he had discharged him, and it is not sufficient to answer only to the damnification, as if I be bounden to convey unto you the Mannor

of B, in pleading the performance of the condition, it is not sufficient to shew, that I have conveyed the said Manor, but to shew by what manner of conveyance, viz. by Fine, or Feoffment, &c. 22 E. 4. 43. If the condition be to discharge the Plaintiff, &c. then the manner of the discharge ought to be shewed, but if it be to save harmless only, then non damnicatus, generally is good enough, 40 E. 3. 20. 38 H. 6. 39. The condition of an Obligation was, that the Obligor should keep without damage the Obligee, of such a sum of money against B, to whom he was bounden for the payment of it, and the said Obligo; pleaded, that at such a day, &c. the said B at his request delivered the Obligation to the Plaintiff in lieu of an acquittance, without that, that the Plaintiff was dammified by the said Obligation, before the delivery of it, and it was holden by the Court, that if the Defendant had pleaded, that he had kept the Plaintiff without damage, and had not shewed how, that the Plea had not been good, See 22 E. 4. 40. The Lord Lilles Case. And afterwards Judgement was given for the Plaintiff.

Mich. 29. and 30. Eliz.

X C V I. Heydons Case.

Ralph Heydon pretending title to certayne Land, entred into it, and made a Lease of it to try the title: Upon which his Lessee brought an Ejecione firmæ, in which the parties were at Issue: And now at the day of the Enquest, the Jurors were called, and but five of them appeared, wherupon, the Defendant came and shewed to the Court, that the said Heydon by his Friends and Servants, had laboured the Jury, not to appear, and that for the further vexation of the Defendant who had fourme Verdicts in affirmation of his title, and that the said Heydon to procure the Jury not to appear, had informed to them, that he and the Defendant were in course of an agreement, whereas in truth no such communication of agreement had any time passed betwixt them: And all this was openly deposid in Court, as well upon the oath of the Defendant himselfe as upon the oath of one of the Jurors, upon which the Court awarded an Attachment against the said Heydon, to answer the contempt: And also granted to the Defendant, that he might sue a Decem tales with proviso, for his own expedition.

Mich. 29. and 30. Eliz. In Communi Banco.

X C V II. Smith and Kirfoots Case.

Smith brought Debt upon an Arbitrament against Kirfoot, and declared that the Defendant and he, imposuerunt se in arbitrium, ordinacionem, & judicium, Johannis Popham ar. arbitratoris indifferenter electi, de jure, titulo, & interesse in quibusdam Messuagis, &c. Who taking upon him the burthen of the Arbitration, ordinavit, that the said Defendant should pay unto the Plaintiff ten pounds, in plenam satisfactionem, &c. and thereupon he brought his Action: It was moved by Walmesley Serjeant, that the Declaration is not sufficient, for it appeareth that the Arbitrament set forth in the Declaration is utterly void, because whereas ten pounds is awarded to the Plaintiff, nothing is awarded to the Defendant, and so the Award unequal, and so void. But the Court was clear of opinion, that notwithstanding that such an Arbitrament be void in Law, yet it may be for any thing that appeareth, that the award is good enough: For the Plaintiff is not to shew in his Declaration all the Award, but such part only of it which doth entitle him to the thing,

thing, &c. and if the Defendant will impeach the Award for any thing, that is to come in on his part, vi. ac. Book Entries, 152. 123. vi. For the Arbitrament, 39 H. 6. 12. by Moile, 7 H. 6. 41.

Mich. 29. & 30. Eliz. In Communi Banco.

XCVIII. Arundell against Morris.

Richard Arundell sued an Audita Querela against Morris, and it was com-
prehended in the Willit; That Morris had recovered against him a cer-
tain Debt, and that he was taken by a Capias ad satisfacendum, at the suit ^{Audita Querela.} of the said Morris, by Hickford Sheriff of the County of Gloucester; who let
him go at large, &c. And they were at issue, upon the voluntary escape, and
it was found for the Plaintiff: It was objected in arrest of Judgement, that
the Willit of Audita Querela is not good, for the words are, that the Plaintiff,
capius sui virtute brevis nostri judicialis, whereas this word (judicialis) is
not in the Register; but only brevis nostri de capiendo. But by the whole
Court, the Willit is good, for the word (judicialis) is but a word of surplusage,
and shall not make void the Willit: And afterwards Judgement was given
for the Plaintiff.

Mich. 29. & 30. Eliz.

XCI. Brook against King.

In a Debt upon an Obligation by Brook against King, the Defendant plea-
ded, that the Bond was endorsed, with such condition, viz. That if the said Deb-
tient King shall procure one IS to make reasonable recompence to the
Plaintiff for certaine Beasts which he wrongfully took from the Plaintiff,
that then, &c. And he laid in factio. That the said IS had stolen the said
Beasts from the Plaintiff, and thereof he was endited, &c. and so the condi-
tion being against the Law, the Obligation was void, upon which the Plain-
tiff did demur in Law. And it was argued by the whole Court: That where
the condition of an Obligation shall be laid against the Law, and therefore
the Obligation void, the same ought to be intended where the Condition is ex-
plicitly against the Law in express words, and in terminis terminantibus, and
not for matter out of the condition, as it is in this case; And Judgement was
given for the Plaintiff.

Mich. 29. & 30. Eliz. In Communi Banco.

C. Hawks against Mollineux.

Ha Replevin by Hawks against Mollineux who avowed for Damage-
fiant; The Plaintiff in Bar of the Abovity, pleaded that Sir Gervase
Piston Knight, was seised of a Hesnage and twenty Acres of Lands; And Replevin.
that alwayes those whose estate, &c. have used to have Common in the
place where, &c. for all their Cattell commonable in this manner, viz. If
the said Land be sowed by assent of the Commoner, then no Common, until
the Corne be mowed, and when the Corne is mowed, then Common untill Prescription,
the Land shall be sowed againe by assent of the Commoners: And this Pre-
scription was found by Verdict, and exception was taken to this prescription
because against common right, so as a man cannot sow his Land without the
leave of another. But the exception was disallowed by the Court, for the pres-
cription was holden to be good by the whole Court, for by the Law of the
Land, the Owner of the Land cannot plow the Land where another hath com-
mon; but here is a benefit to each party, as well for the Owner of the Land
against the Commoner, as for the Commoner against the Tenant of the
Land, for each of them hath a qualified Interest in the Land.

Intr. Pasch. 29. Eliz. Rot. 1410. In Commonh Barw.

C I. Baldwin and Cockes Case.

Replevin.

Baldwin was Plaintiff in a Replevin against Cockes, and upon the pleading the Case appeared to be this, That Sir Richard Wayneman was seized of the place where, &c. and leased the same to one Trupeny and one Eliz. Readie for term of one and twenty years, if the said Trupeny and Eliz. or any child or children besoyle them begotten should live so long, Elizabeth within the term dyed without issue; If now the term for one and twenty years be determined was the Question. And the Lord Anderson conceived, that the estate for years is not determined by the death of Elizabeth. And it was argued by Shuttleworth Serjeant, that upon the matter the term is determined: And he put the Case of the Lord Bray, 3 Eliz. Dyer 190. Where the Lord Bray sold unto four great Lords the marriage of his Son and Heir, to the intent to be married at the appointment and nomination of the said Lords, the Lord Bray dyed, one of the said Lords before any marriage, or appointment, or nomination dyed, the Son is married by the appointment, &c. of the surviving Lords; That marriage is not within the intent of the Covenant, and adjudged that upon that marriage no use should accrue. And also he cited this Case adjudged in the Kings Bench. The administration is committed to one durante minore state of two Infants, one of them becomes of full age, the power of the Administration is determined, which Walmesley Serjeant granted, for it is but an authority, but here in the Case at Barre is a matter of interest. And by Anderson all the construction of this lease and grant rests upon this point, if this way (Or) either shall be taken as disjunctive as it is in its nature, or as a conjunctive, and if it be taken as a disjunctive, if it make the whole sentence in the disjunctive, as if the limitation had been, if the Husband or wife or any Child, &c. And Fenner, put this Case out of 17 E 3. as he cited it. Land is given to I S in Fee so long as A B hath issue of his body. A B dyeth without issue, his wife, privimen, enjoint. Now the estate is determined, and upon birth of the issue after shall not revive, which Rhodes and Anderson denied, for in many Cases the Law shall respect the cristiency of the child in the mothers belly: And see 7 Eliz. Plow. 289. where a Copulative shall be taken in the disjunctive, as a covenant with B to make a lease for years of such Lands to the said B and his Assignes, the same shall be construed, or his Assignes. And it was clearly agreed by the other parties, that if the words had been, If Trupeny, Elizabeth, or any child or children, &c. so long, &c. upon the death of any of them the interest is determined: And by Rhodes, Periam and Windham in the principal Case, the lease shall endure as long as any of the persons named in the Proviso shall live, and so seemed to be the meaning of the parties. And Anderson hescavac in the words of the limitation, i. the Habendum to the said Trupeny and Eliz. for one and twenty years a festo Sancti Joannis Baptist. post terminum annorum (the expiration of a former term) if the said Trupeny and Elizabeth, or any child, &c. And he conceived, that the limitation did go to the commencement of the lease only, and not to the expiration or determination, as if the lease should not begin if they all were not alive at the commencement of the lease: And all the other Justices were clear of the contrary opinion, for by them this limitation shall goe, and shall be referred to the determination of the Lease, and not to the commencement of it.

And by Anderson, if any cause should be, for which the lease should endure until the years be encurred, notwithstanding the death of the Husband or Wife, it was because the lease was intended a common advancement to both,

Exposition of
words in
deeds.

for it should be in vain to name the wife in the lease, if the lease should cease by the death of the Husband. And afterwards after many arguments on both sides, it was adjudged, that by the death of Elizabeth, the lease was not determined, for the disjunctive, before (Child) makes all the limitation in the disjunctive.

Mich. 29. & 30. Eliz. in Communi Banco.

C II. Zouch and Bamfilds Case.

The Case between the Lord Zouch and Bamfild was now argued by the Justices. And Rhodes the puisne Justice argued, that the Lord Zouch the Demandant should be barred; four Exceptions have been taken to the barre: First, because it is not shewed in the barre that the moiety of those sixty messuages, &c. of which he pleads the fine, was parcel of the manor at the time of the fine levied; for the pleading is, that the Grandfather of the Demandant was seised of the said manor, unde medietas predictorum &c. messuagiorum, &c. a tempore cuius contrar. memoria, &c. was parcel, and so seised de manero predict. unde, &c. Finis se levavit; and he conceived that the pleading notwithstanding that was good enough; for he hath said as much in effect, contrar. cuius memoria hominum non existit, in the present tense, which amounts to this, that men cannot remember, &c. but that this moiety was parcel of the said manor: As 10 H 7. 12. In an Assize of common, the Plaintiff makes his title, that he was seised of a messuage and carpe of Land in D, to which the said Common is appendant, and that he and all his Ancestors, and all those whose estate he hath, &c. have used to have Common, &c. Exception was taken to the title, because the Plaintiff doth not shew in his title, that he is seised of a messuage, &c. for if he hath aliened the messuage, the Common passeth, so if he be disseised, &c. but the Exception was not allowed, for it appeareth upon the words of the title, that the Plaintiff is seised: i. all those whose estate he hath in the present tense, which words do shew and declare possession and sitz in the Plaintiff, the time of the plea pleaded, so in this case, the substance of the words, in which the defect is assigned, is ut supra; That men cannot remember, but that this moiety was parcel of the manor, and then the words after, unde, &c. redditum manerium predict. unde &c. shall have the same construction as before. Periam conceived, that the Barre is nought for the cause aforesaid, for it is not so pleaded, that we can abridge upon it, that the said moiety was parcel of the manor at the time of the fine levied, and then the fine cannot extend unto it. And the reason alleged by my brother Rhodes shall not help that matter, for the said words cannot be construed otherwise, but that no man can remember but the said moiety was parcel, but not that it is parcel, or at the time of the fine levied was parcel. Vide 32 H 6. 24. In Trespass, the Defendant pleaded, That A was seised of the manor of D, whereof the place, &c. is parcel, he ought to say especially, that the place where was parcel of the manor at the time of the trespass supposed: Windham conceived, that the plea was good, and that it appeareth well upon this plea, that the said moiety was parcel of the said manor at the time of the fine levied, for he pleads, that the Grandfather of the Demandant was seised of the manor of N; Unde medietas predictorum, &c. a tempore cuius contrar. memoria hominum non existit, & sic scilicet existens, Finis se levavit; sic scilicet; i. e. seised of the manor in such sort, as the manor is set forth before, and that is good pleading, especially by way of bar, which if it be good to a common intent, is well enough: and the word (unde, &c.) so often repeated after shall be idle and to no purpose if the Law shall not give such a construction. Anderson to the same purpose. And he much

Averrement, relied upon the reason of Windham, and so soised. Another Exception was taken to the Barre, because in pleading of the Fine, it is not averred, that the Tenant at the time of the Fine levied was of full age, out of prison, &c. And as to that Rhodes took the difference between the pleading upon the Statute of 1 H 3. where these disabilities are within the purview of the said Statute, and upon the Statute of 4 H 7. where in the body of the Statute no mention is made of them, but afterwards in an especial Exception by it self, and he cited the opinion of the Justices, especially of the Lord Dyer in the Case reported by Plowden. 3 Eliz. 305. betwixt Scovel and the Lord Zouch : Periam to the same intent, and upon the same reason, and further he said, that although the Statute of 32 H 8. contains in its purview the same disabilities ; Yet this Fine is pleaded upon the Statute of 4 H 7. and therefore the pleading of the same shall not be directed nor waged by the Statute of 32 H 8. which hath not alter the pleading of a Fine which was before, nor the reason of it, for it is not properly a Statute, nor do Fines receive any strength or virtue by it, but is but a construction of the said former Statute. And he put the Case betwixt Hide and Umpson ; where Umpson meane betwixt the Statutes of 32 and 34 H 8. Declared his Will of all his Lands, which devise if it be good for two parts of the Land devised it was doubted, or that the devise should be void for the whole, afterwards came the Statute of 34 H 8. and cleared the doubt, for to that intent it was made, and in the said Statute there is a Proviso, that the said Statute shall not extend to the Will or the Devise of Tho. Umpson, or shall be prejudicial or hurtful to any person or persons for any Lands, &c. contained or specified in the said Will or Devise, but that the said Will and Devise shall stand, remain and be in the same case, in force and effect in the Law, as the same was before the making of this Act. Now notwithstanding that Proviso, the Will of Umpson was holden good but for two parts, for so the Statute of 34 H 8. construes the Statute of 32 H 8. So in one Case, the Statute of 32 H 8. of Fines construes the Statute of 4 H 7. to extend to Fines levyed by Tenant in tail, therefore the estate tail shall be adjudged in Law to be bound by the Statute of 4 H 7. and not by 32 H 8. which is rather a Judgment upon the said Statute of 4 H 7. then any new Statute. Windham to the same intent, and he relied upon the reason aforesaid. And further said, if one will plead a Lease made by Tenant in tail upon the Statute of 32 H 8. he need not to aver the full age of the Lessor, and yet that quality of full age is within the purview of the said Statute. First, all Leases to be made, &c. by any person being of full age, &c. and so is the common use of pleadings. And of the same opinion was the Lord Anderson for the said Exception, for the reasons, and upon the difference aforesaid. Another Exception was taken to the Barre, because it is not alledged, that the said Fine was engrossed in the same Term in which it was levied. And as to that, it was holden by Rhodes, that in pleading of a Fine it needs not to shew any engrossing of it ; and so are many Presidents, vide Plowd. Com. Smith and Stapletons Case. 15 Eliz. 428. Where a Fine is pleaded, Quadam finalis concordia facta fuit in Octav. Sancti Hilarii 35 H 8. & postea a die Pasch. in quindecim diei 36 H 8. concessa & recordata, &c. Super quem finem proclaim. secundum formam Statuti facta fuerit. viz. prima proclaim. 7. Maii. Term. Pasch. 36 H 8. without any mention of the engrossing of it : And see the Case betwixt Scovel and the Lord Zouch, where the Fine is pleaded as it is pleaded in the Case at Barre, qui quidem finis in forma predicta levatus (and that fine was levied Pasch. 30 H 8.) ingrossatus fuit, & postea in Curiis predictis secundum formam Statuti, &c. lectus, & proclamat fuit, viz. prim. proclaim. Term. Pasch. 30 H 8. And so upon the matter it is sufficient to shew, that the Fine was engrossed the same term in which it was levied, for the Fine is pleaded to be levied Term. Pasch. qui quidem Finis ingrossatus fuit, & postea proclaim. vid. l. prim. proclaim. Termino Pasch. which was the same Term it was levied : And so admit.

admit, that in pleading it ought to be shewed that the Fine was engrossed in the same Term in which it was levied, &c. Now it appears here to us by necessary consequence, that the Fine was engrossed accordingly. And also the Ingrossement is pleaded as the Statute is penned, for the words of the Statute of 4 H 7 are, After the engrossing of every Fine, the same Fine to be openly read and proclaimed in the same Court, the same Term, and so the words of our plea here pursue the words of the Statute; for the said Statute doth not require by express words, that the Fine be engrossed the same Term, but the same is to be conceived by matter of construction and implication, and according to such manner of speech this plea is pleaded. And of the same opinion was Windham, and upon the same reason Anderson conceived, that the Tenant in pleading of the Fine ought to shew in express words, that the Fine was engrossed the same Term in which it was levied; for whosoe'er in pleading a plea will take the benefit of the Statute ought precisely to follow the Statute in all points, and it is clear, that if the Fine be not engrossed, according to the Statute, that then it is not any barre by the Statute, and therefore it ought to be expressly alleged according to the Statute, and not by implication only.

Another Exception was taken to the Barre (as was remembred by Windham) i. pro ut per finem hic in Curia de recordo remanen. plenus apparat; without saying, & per proclamation. inde, &c. But that Exception was disallowed by Periam and Windham, for the Fine had been good and well pleaded, without any such conclusion, pro ut, &c. And also the proclamations are endorsed upon the Fine, and then they appear upon the Fine, according to the words of the said conclusion. And so by Windham are many Presidents, which is in the said Case between Scovel and the Lord Zouch cited before, pro ut per finem illum hic de record. remanen. plene liquet. And see 1 Eliz. Plowden 224. between Willion and Barkly, a Fine pleaded without any, pro ut, &c. Anderson took an Exception to the Barre at the beginning of it: i. Quod medietas 60. Messusgiorum, &c. parcel medietatis 70. Messusg. predict, that that is no good pleading; for one moxety cannot be parcel of another moxety, for every moxety is entire.

Rhodes took Exception to the Heylevin, because the Demandant in absence of the Fine, that at the time of the Fine levied Bamfild was seised, & semper posita, & hucusque, &c. of the moxety in Demesne, and doth not traverse the seisin of the Censuor at the time of the Fine levied, for her two contrary pleas stand before us in equity of truth; *æque vera, æque falsa, æque dubia*, and a traverse would have made an end of all, and reduced the matter to certainty: And by Periam, the Barre is not answered, for every Barre ought to be traversed, confessed, or avoided, see 6 H 7. 5. and 6. Where it is said by Hussey and Fairfax, where matter in fact is alledged by way of Barre it ought to be traversed, if it be not for the mischief of tryal, as in case of Barkly, where a thing is alledged to be done beyond the sea; or to leave the matter in Law to the Court, without putting the same to the Judgement of the Lay-people, &c. See also 5 H 7. 12. Wher it is holden, that a thing material alledged in the Barre ought to be directly traversed, or confessed, or avoided in fact or in Latin, or conclude the other party by matter of estoppel: And that two affirmatives cannot make a good title; But the matter alledged in the Heylevin scil. that Bamfild was seised at the time of the Fine levied shall be holden for true, and the matter alledged in the Barre, scil. that the Censuor was seised, as not answered, for it shall be taken true, until it shall be avoided and destroyed by matter in Law, traverse, &c. Vide Librum. So he in behalf of traverse, the Barre is not answered but argumentative, scil. Bamfild was seised, ergo, the Censuor was not seised: And it is a common learning that in every Replication there ought to be certainty as to that: See the Case betwett Palmerston and Steward 2 Ma. 103. that a Barre ought not to be answered by argument:

gument : And as to the certainty which is requisite in a Replication. See the Case betwixt Wimbishand Talboies, Plow. Com. 4 E 6. 42. where the Plaintiff shewed in his Replication his title as Heir, but because he did not shew, how heir, for want of such certainty in the Replication, the Plaintiff could never have Judgment, although the Justices for the matter in Law then in question were clearly resolved for the Plaintiff, and here in this Replication the uncertainty is such, that the Court doth not know to which to give credit, to the Plaintiff, or to the Defendant, and the bare matter of the Replication is not sufficient ; for in avoidance of a Fine, to say, that a Stranger to the Fine, at the time of the Fine levied, was seised, was never received, but that, partes Fines nihil habuerunt, that was the ordinary plea. Windham to the same intent ; that which the Demandant hath alledged in avoidance of the Fine, is but matter of argument and implication. And we ought in this Case first to be assured of the matter of fact, scil. Whether Zouch or Bamfied were seised, and the Court doth not know to which to give credit, 39 H 6. 49. in Debt by an Executor, the Defendant pleaded, that the Testator made the Plaintiff and one A his Executor, which A is living, and the Plaintiff pleaded, that the said A died within such a tyme before the suit brought, &c. and adjudged no plea, without traverse, without that, he was dead, for here are 2 affirmatives, whereon a good issue cannot rise, which see 32 H 6. 23. The Def. in a Replevin avows for a Rent service, the Plaintiff pleads, out of his Fee, the Avouant saith, within his Fee, he ought to traverse, without that that it is out of his Fee, and for default of the traverse the pleading of both parties, as to the several allegations of the seisin in Bamfied and Zouch may be true, for they both might be joint tenants of the said moiety at the time of the Fine levied, in which case, as to the moiety of the moiety it is good enough. And yet when in pleading it is alledged, that A was seised, &c. If the other party plead, that A had nothing but jointly with B he ought to take a Traverse, without that, that A was sole seised, and yet sole seisin is not expressly alledged but when the other party pleads, that A was seised, it ought to be intended a sole seisin. Which see 1 E 4. 9. 37 H 6. 31. And it was never a plea admissible against a Fine, to say, that the Conuso had nothing at the time of the Fine levied, which see 41 E 3. 14. and also 38 E 3. 1. 3. 8 H 6. 27. In Trespass the Defendant pleaded the Fine of the Ancestors of the Plaintiff, who said, at the time of the Fine levied he himself was seised, without that that partes ad finem aliquid habuerunt, which see 46 E 3. 14. and a Fine ought to be avoided by not seisin of the parties to the Fine, and not by the seisin of a stranger to the Fine ; and there is not any book in the Law that alloweth such an averment of seisin in a stranger to the Fine, without answering to the seisin of the parties to the Fine, but 13 H 8. In Assise, the Tenant pleaded a Fine upon Render of the Ancestor of the Plaintiff, to which the Plaintiff said, that before the Fine, at the time of the Fine, and afterwards continually, he himself was seised, and the same was holden no plea against such a Fine upon a Render, notwithstanding the pivity of blood ; contrary, against a Fine which proves a gift precedent.

Anderson to the same intent. The Replication for want of Traverse is incurable, for we as Judges do not know what to do, because that the truth of the matter in fact doth not appear unto us, and so neither the matter in Law, for every plea ought to be traversed, or confessed, and avoided, otherwise nothing appears to us, and we cannot know whether the Conuso or Bamfied were seised at the time of the Fine levied, for otherwise the matter in Law cannot rise, and yet I well know, that although a traverse may be spared in respect of a matter in Law which should be choaked and put out of the book by the traverse, or for the mischeif of the tryal as aforesaid said, where a thing is alledged to be done beyond sea. 19 E 4. 6. In debt the Defendant pleaded, that the Plaintiff was born at Denmark, under the obedience of the King of Denmark,

the Plaintiff by Replication said, that he himself was born at D in England in the County of York, there he shall not take a traverse without that, that he was born at Denmark, for there such tryal cannot be, but in such case the Defendant by way of Rejoinder shall say, that the Plaintiff was born at Denmark, without that that he was born at D in the County of York: And it is true, a supposal of a Wilte or Count may be answered to an Affirmative, but a matter alledged by expresse wordes cannot.

Rhodes, admitting now that the Barre be naught, and the Replication faulth, as it is, then I conceive, that if the point of the Action be confessed by the Barre, the Court shall give Judgement upon the Barre, and shall not meddle with the Replication, but if it be not confessed by the Barre, that then there shall be a Repleader. And I do conceive, that a Repleader may be awarded upon a Demurrer in Law: which see Plow. i Ma. in the case betwixt Browning and Belton 138. In Despasse the Plaintiff doth suppose the Despasse in two places, scil. in Berkestreet and in Southwark in the County of Surrey: as to the Despasse in Southwark the Defendant doth justifie by special matter of a Lease, without answering any thing to the Despasse in Berkestreet. The Plaintiff doth reply, and makes his title by a Lease more ancient then the Lease to the Defendant; upon which the Plaintiff doth demurre in Law. Now the defet in the Barre appearing, the Court awarded a Repleader. And 9 H 6. 35. in a Replevin the Defendant avowed for damage seafant. The Plaintiff made title by Common. The Defendant pleaded a Release of the Common by deed, which was not a perfed deed, upon which the Plaintiff did demurre in Law: And the Replication, in which the imperted Release was, was holden nought, but because there was a defet in the Barre to the Action by the title of Common, the Court awarded, that the parties should replead, not in respect of the vitious plea upon which it was demurred, but in respect of the defet in the Barre: And so in this Case Periam said, that nothing should be awarded in this Case but where an Issue is joyned, for an Issue is alwayes joyned upon a point certain. But upon a demurrer all the parts of the pleading the Count, the Barre, &c. are referred to the Court, as well for the form as for the matter. The book which hath been touched to the contrary out of 9 H 6. I have proctored search to be made for the Roll, but it cannot be found, it is inconvenient, that after a demurrer a Repleader should be granted, for then Causes should never have an end: And as to the Case betwixt Browning and Belton, the Repleader there was permitted by the assent of the parties, rather than awarded by the Rule of the Court.

Windham to the same intent, that no Repleader shall be in this Case, and he saith, that in the time of the Lord Dyer the opinion of the Court was so: And as this case is, the plea in Barre being good, and the Demurrer being upon the Replication, no Repleader should be, for a Repleader shall never be granted, where the plea upon a Demurrer is not good, but if the Barre be not good, and the Defendant doth demurre upon the Replication, there a Repleader may be. And as to Browning and Beltons Case he conceived, that the parties did plead de novo, but not replead, for if it had been a Repleader, then the parties should begin to plead where the first defet was, as if the defet be in the Barre, there the Repleader shall begin, but the Declaration shall stand: But in the said Case of Browning and Belton, the Plaintiff pleaded all de novo, as a new Count, &c. and yet the first defet was in the Barre, and therefore he conceived, that there it was not a Repleader, but that the parties by assent did plead de novo.

Anderson was of opinion, that as this Case is, no Repleader shall be, and yet he held the Repleader might be upon a Demurrer as well as upon an Issue joyned; For a Demurrer joyned is an Issue to be tried by the Judges, &c. and such was the opinion of Manwood cheif Baron. And the Judgement in the Case betwixt Browning and Belton is not that the parties shall plead de novo,

novo, but that they shall replead. See there folio 138. a. and in that Case there might well be a Repleader, for there the truth of the matter in fact is confessed in the pleading, but in the Case at Ware it is otherwise, for the pleading is so obscure, that we do not know the truth of the matter, and the right of the matter doth not appear unto us.

And by Periam, as to that which hath been laid, that upon the demurrer upon the Replication, the seisin of Bamfeild at the time of the Fine is confessed. Sir, it is not so, for no more shall be holden confessed by a demurrer, but that which is duly and sufficiently pleaded, and because the seisin of Bamfeild is not sufficiently pleaded, therefore not confessed; and for proof of that learning, see the Case betwixt Wimbish and Talbois; and the Case betwixt Hill and Graunge: 1. Mar. Plowd. 171. and see the Case betwixt Partridge and Croker; and so was the opinion of the Lord Anderson, who relied much upon the Case, where it is laid, that in pleading a plea, all matters in fact well and materially alledged by a general Demurrer are confessed to be true.

Rhodes. Now we are to see, if by the Statute of 27 Eliz. cap. 5. This defect in the Replication may be salved, and I conceive, that this Statute doth extend to all imperfections which happen by the Act; Disposition, or negligence of the Clerks or Council, for the Client propounds his Cause to the Clerk and his Council to manage in the course of his suit, and if the Clerk or Council erre therein, or in that which to them belongeth: The Client as to that shall be relieved by the Statute; but if there be any defect in the matter, so as the matter will not serve, it is otherwise. As 5 H. 7. 1. In the Roll of a plea there were divers spaces (for the year and day) void and blank, now in another Term, the Judges could not amend them, but now by the said Statute they may. So colour in Assize wanting is helped by this Statute, se the usual averment, & hoc paratus est verificare, &c. left out, the Court hath power to amend it, and so by him the Court by this Statute hath power to amend that defect in Trespass.

Periam to the contrary. And that this default of Traverse is not amenable by the said Statute, for it is enacted by the said Statute, that upon a Demurrer the Judges shall give Judgement as the right of the cause and matter in Law shall require; but in our case, as the pleading now is, no right of the cause or matter in Law appears according to which we can judge, for we upon this pleading cannot tell whether the Conuso or Bamfeild was seised at the time of the Fine levied, for upon the Demurrer upon the Replication the seisin of Bamfeild is not confessed, because it is not well alledged: And if it had been well alledged, yet it had not been confessed, because that the Tenant who demurs upon the Replication, hath in his Bar expressly alledged, that the Conuso was seised: An Originall writ of Debt against one as Executour in the debet and detinet could not be amended by 8. H. 6. but now by the Statute of 27. Eliz. it may, See 23 E. 4. 21, 22. So nominare or presentare in a Quare Impedic shall be now amended by this Statute; And in a Writ of Formedon, discendre or remanere shall be amended by the said Statute of 8 H. 6. 44 E. 3. 13. vi. 11 H. 7. 1, 2, 3. In Assize, upon whom the Plaintiff, where it should be upon whom the Defendant entered; And if the Averment usual as above was misse set down, it was amendable, but if it were utterly left out, not, but now in both Cases it is amendable, so, defendant vim & injuriam quando, &c. if it be left out, it is amendable, for all these matters lye in the Conusance of the Clerk, but in our Case, the right of the cause and matter doth not appear unto us, for if Bamfeild was seised at the time of the Fine levied, then as the Demandant and his Councill pretend, the Law is with the Demandant, and if the Conuso and not the Defendant, then the Law is with the Tenant, as his Councill hath argued, so as the right of the cause consists and depends upon the truth of the seisin, which matter doth not appear unto us: And if we enter in course of amendment,

ment, we doe not know if the Demandant would have traversed, without that, that the Consulor was seised, which shall not be a good Traverse, or absque hoc, quod partes ad finem aliquid habuerunt, &c. which although it be a good Traverse in Law, yet we do not know if the truth of the cause will serve to maintaine such matter, and because without altring matter we cannot amend the Plea : Windham to the same purpose ; Soz by the Statute of 27. Eliz, we ought to judge in this case, as the right of the cause and matter in Law shall appear; but in this case neither the right of the cause nor the matter in Law appeareth unto us, according to which we can judge, for we know not to which of the parties to give credit, touching the seisin of the Consulor, or Bamfeld at the time of the fine levied, for as to our judicall knowledge, both Pleas are to us equally dubious ; And he argued the Cases put before touching amendment of matters upon default of the Clarke, scil. de hoc ponit se super patriam, left out, so, colour in Assize, and Trespass wanting, so, & hoc paratus est verificare, all which matters are amendable by the Statute of 27. Eliz. But he said, that if in Trespass the Defendant doth justify by a Lease for yeares, without shewing the place where the Lease is made, it is not amendable, for it is matter which lyeth in the notice of the party only, and not in our judicall knowledge : And as to the Case of 5. H. 7. 1. of the places left, he conceiveth it is not amendable in another Term by this Statute, for that is materiall, and the filling of those spaces the parties themselves shall supply and not the Court, for the Court shall never amend, where their amendment makes alteration of the substance of the pleading, or of the Verdict, as 20 H. 6. 15. In Trespass, the Plaintiff declared of a continuando usque diem impetracionis brevis, viz. 18. die Martij, where the Teste of the writ was, 2. die Januarij, the Defendant pleaded to Issue, which was found for the Plaintiff, and that Disposition of the Teste or date of the writ could not be amended. And no amendment upon this Statute of 27. Eliz. two things are to be considered.

First, that the Judges, in such amendment, medle not with matter, nor alter the substance.

Secondly, that they doe not amend but according to their judicall knowledge.

Anderson, to the same intent, for as it hath been said before, the truth of the Case doth not appear unto us according to which we can judge, and I conceive that upon any amendment upon this Statute, we cannot take out one Roll and put in another, and as our case is we cannot amend this defect without taking out the whole Roll, and therefore in the Case of Leonard, which trans late Custos brevium here, where in a Replevin he avowed for a Kent service, and upon speciall Verdict the Case was, that Sir Henry Illey held of the said Leonard by Fealty, and the Kent mentioned in the Avoirry, and was attainted of high Treason, and the King seised and granted the Land to the Plaintiff, upon whom Leonard avowed for the Kent service, and I and my companions were agreed, that the rent, notwithstanding the seizure and grant of the King remained distrainable of common right, but Leonard could not have returns of the Cattell, because he had avowed for a Kent service, and now it appeareth to us upon the Verdict, that he had right to so much rent, but not to such a Kent, but a Kent lechc distractable of common right, so a Kent in another degree; and we also argued, that the Avoirry was not amendable, for then upon such amendment, we ought to take out a whole Roll, which was not intended by this Statute : And he conceived also, that in debt against Cutlers in the Debet & detinet, such a writ shall not be amended by this Statute, and he conceived, that his exception to the Bar, quo ad medietatem, 60. Melleug. &c. parcell. medietatis, &c. is relieved by this Statute, for the meaning appeareth : And also the exception, that it is not expressly shewed that the fine was engrossed in the same Term in which it was levied. And

Periam moved another matter, if now the parties demurring in Law as to part of the Land in demand, and being at Issue upon the residue, if the Court shal adjudge the matter in Law, before the Issue be tryed, or not, 32. H. 6. 5. & 6. In Trespass for taking of his Cartell, the Defendant as to parcell pleaded not guilty, and as to the remenant pleaded another Plea, upon which the parties did demur, and there they proceeded to tryall before the matter in Law determined, and found for the Plaintiff, and he had Judgement thereupon for the damages, but the costs were suspended untill, &c. And the Defendant brought his Writ of Error, 48 E. 3. 15. In an Action of Waste, as to parcell the Defendant pleads, no Waste, and as to the rest pleaded matter in Law, upon which there was a demurrer joined; It was holden, that the Issue shoul not be tryed untill the matter in Law be determined: But it was said by Fulthorpe in Trespass, if the Defendant to parcell plead to Enquest, and to other parcell matter in Law, in such case he shoul proceed to tryall presently, and damages shoul be taxed of the whole, as well of that upon which there was a demurrer in Law, as of that of which the Issue was joined, ad quod non sicut responsum, see also 11 H. 4. 228. In Trespass, the Defendant pleaded to Issue for part, and for the residue did demur in Law, Processe for the tryall issed before the matter in Law determined; And Periam conceived that the Court might proceed in such Case, the one way or the other: As to the matter in Law, whether the issue in tail uppon this Fine shoul have the Averment, he conceiveth, that he shoul not have the said Averment for that it shoul be very perillous to the Inheritances of the subjects. And he argued much upon the dignity of Fines out of Bracton and Glanvil, whom he called Actores, non Authores Legis; and that Fines, at the common Law, were of great authority untill the Statute of West. 3. And afterwards by the Statute of 34 E. 3. of non-claime, from whence they became to be of so little value in Law, that they were accounted no other then Feoffments upon Record, so as therby no assurance was of Inheritances but a generall incertaintie untill the Statute of 4 H. 7. by which Statute they were restored to their ancient power and virtue: After which Statute many Chists were devised, to creep out of it: So as the Statute of 32 H. 8. was made to take away all questions and ambiguities which were concived upon the said Statute of 4 H. 7. And therfore we who are Judges ought to frame our Judgements for the maintaining of the authoity of Fines, for so the possestions and inheritances of the Subjects shall be preserved; And that is the reason, that if a Stranger leuy a Fine of my Land in my name, that I have not any remedy but a Writ of Deceit against him who leuyes the Fine, so if a Feme covert leuyeth a Fine of her Land as a Feme-sole, the same shall bind her after the coverture, if the Husband do not enter upon the Conusee during the coverture and interrupt the possession gained by the Fine: And 17 E. 3. and our Books are very plentifull to this purpose that the Law doth agre admitt of such allegations against such Fines: A Fine was pleaded in War of Land in A, B, and C, he against whom it was pleaded, was not received to aver against the supposal of the Fine, that there was no such Town or Hamlet as A, 46. E. 3. 5. A woman Tenant in tail, had Issue a Daughter, who was inheritable to the tail, the Daughter took a Husband, and they both living, the Mother, and during her seisin, leuyed a Fine of the Land entailed to a stranger, sur conusans de droit, come ceo, &c. who rendred the Land to the Husband and Wife in speciall taile, the Husband dyed having Issue, the Wife took another Husband, had Issue, and dyed, the Husband to entitle himselfe to the Land as Tenant by the curtesie, would in pleading have averred the seisin of the Mother at the time of the Fine leuyed, and he could not, and yet he was a stranger to the Fine, but he was privy to the estate, and his claime was by her who leuyed the Fine, 6 E. 3. 45. Fitz. Averment 40. In a Writ of Entie, sur disseisin, the Fine of the

Ancesto^r of the Demandant was pleaded in Bar by the name of W, the De-
mandant in abydancē of it would have said that the name of his Father was
R, to have aboild the Fine, but to that he was not received : And 3 E. 3. 32.
scil. Averment, 42. In a Formdon, the Tenant pleaded Ne dona par, the De-
mandant by Replication said, That a Fine was levyed of the same Lands,
between the Father of th. Demandant, and one T, by which Fines the Fa-
ther of the Demandant did acknowledge to I the Lands, come ceo, &c. and
the said T gave by the said Fine to the Father of the Demandant the Land
intaille. Where it is said by Stone, that since the gift is proved by as high a
Record, a man shall not aver against such matter in abydancē of the said
Fine, &c. and yet the party against whom it was a stranger to the Fine;
And see 38 E. 3. 7. The Lord shall not be received against a Fine levyed by
his Tenant to aver the dying seisin of his Tenant in his Homage. And as
to the Issue in tail, he conceiveth, that the Averment doth not lye for him, for
the Issue in tail is as much pri^ry, as the Heir of a Tenant in Fee simple.
And see 33 E. 3. scil. Estoppell 280. In a Formdon, the Tenant toucheth,
the Demandant Counter-pleaded, that the Toucher nor any of his Ancestors
had any thing in the Land in demand after the seisin, &c. to which the Te-
nant said, that to that the Demandant shoulde not be received, for the Father
of the Demandant after the guist levyed a Fine to the Ancesto^r of the Tou-
cher of the said Land in demand, sur conusans de droit come ceo, &c. and the
same was holden a good bar to the Counter-plea.

And it was said by the Justices, That although the Statute of West. 2. of
Donis conditionalibus, doth not avoid the Fine as to the soe closing of the Issue
in tail of his Formdon, yet it remaineth in force as to the restraining of the
heire in tail to aver a thing against the Fine as well as against the heire in
Fee simple, and in all Cases, where he against whom a Fine is pleaded
claimes by him who levyeth the Fine, he shall not have the same Averment,
but where he claimes by a stranger to the Fine, there he shall have it well e-
nough, see 33 H. 6. 18. If my Father Tenant in tail, or in Fee, grant the
Land by Fine, and afterwards I make Title to the same Land by the same
Ancesto^r, and the Fine is pleaded against me, I shall not be received to say
that those who were parties to the Fine had not any thing at the time of the
Fine levyed, but such a one an estranger whose estate, &c. but it is a good Plea
for me to say, that after the Fine such a one was seised in Fee, and did enfeoff
me, vi. 22. E 3. 17. before 33 E. 3. Estoppell 280. And Dyer 16. Eliz. 334.
The Father is Tenant for life, the Remainder in Fee to his Son and Heir,
levyeth a Fine to a stranger, sur conusans de droit come ceo, &c. with war-
ranty, and takes back an estate by the same Fine, in that Case it was holden
that the heire shoulde not be received to aver continuance of the possession and
seisin, either ante finem, tempore finis, or post finem, in the Tenant for life,
for it is a Reoſſion upon Record, and makes a discontinuance of the Re-
mainder and Reversion; The only Book in our Law to maintaine the A-
verment is 12 E. 4. 15. by Brian, who although he was a reverend Ing in his
time, yet he erred in this, that if Tenant in tail be dis�ſed, and levyeth a
Fine unto a stranger, sur conusans de droit, come ceo, &c. that the Issue in tail
may well say, that partes ad finem nihil habuerunt, but Choke and Little, were
clear of a contrary opinion, and see in the same yeare, fol. 12. by Fairfax and
Little on, that if Tenant in tail where the Remainder is over to a stranger, le-
vyeth a Fine sur conusans de droit, come ceo, &c. he in the Remainder may
aver continuance of seisin against that Fine, for he is not party, nor heir to
the party, &c. And the Stat. of 4 H. 7. goes strongly to extort such Averment
out of the mouth of the Issue in tail, for the words concerning the same point
are, saving to every person or persons, not party, nor pri^ry to the said Fine, their
exception to avoid the said Fine, by that, that those which were parties to the
said Fine nor any of them had ought in the Land at the time of the said Fine.

levyed : And it is clear, that the Issue in tail is payble to his Ancestor, whose heir to the tail he is, which see agreed, 19 H. 8. 6. 7. And he toucheth the Case of one Stamford late adjudged, Land was given to the eldest Son in tail, the remainder to the Father in tail, the eldest Son levied a Fine, for Contra-
dictio come deo, &c. and dyed without Issue in the life of his Father, and afterwards the Father dyed, the second Son shall inherit, but if the eldest Son had survived the Father, and afterwards dyed without Issue, the second Son should have been barred.

Pericm to the same intent : It shoulde very dangerous to the Inheritances of the Subjects to admit of such Averments, and by such meanes Fines which shoulde be of great force and effect shoulde be much weakened, and he put many Cases to the same purpose as were put before by Rhodes Justice, and he shewed how that Fines, and the power of them were much weakened, by the Statute of non-claim, whereof followed (as the preface of the Statute of 4 H. 7. obserbeth) the Universall trouble of the Kings Subjects, and therfore by the said Statute of 4 H. 7. Fines, for the good and safety of the Subjects were restored to their former Grandeur and authority, which shoulde be con-
served by us who are Judges, strongly and liberally for the quiet and es-
tablishment of present possessions, and for the barring and extinguishing of for-
mer rights, and so did the Judges our Predecessors; which see in the Argu-
ment of the said Case between Stowell and the Lord Zouch : See such lib-
rall construction, 19. Eliz. Dyer 351. Where if Land be given to Husband
and Wife in speciall tail, and the Husband alone leveth a Fine and dyeth
having Issue, the Issue is barred : And it hath lately beene adjudged by the
advice of all the Judges of England, upon the Statute of 1. Ma. Viz. All Fines
levyed, whereupon Proclamations shall not be dayly made by reason of Ad-
journment of any Term shall be of as good force and strength to all intents
and purposes, as if such Term had been holden and kept from the beginning
to the end thereof, and not adjourned, and the Proclamations shall be made in
the following Term, which reason in construction of the said Statute, the
Judges in the case of the Cookes of London, 20. Eliz. have observed, which see
Plowden 538. For although Successors are not mentioned in the said Statute
of 4 H. 7. but only Heires, yet the Judges did construe the said Statute to ex-
tend to them that they shoulde be bounden as well as the Heires; for it is in the
like mischeif, and the said Statute was made for the publick good, and for the
repose of the Inheritances of the Subjects of this Realme, and therfore the
same ought to be largely extended in the meaning & sense of it, and for the be-
nefit of the Possessors of the Lands, and to the destroying of former rights
which were not claimed ; It hath been said, that this Fine is but a Fine by
conclusion, and not in verity; and therfore not within the Statute. But with-
out question, Fines by conclusion are within the Statute. And that
is clear by the Savant, scil. to all persons other then parties to the said Fines,
&c. And Pericm was against the opinion in Stowells Case by Sanders 356.
A Disseisor makes a feoffement in fee upon condition, the feoffee levies a
Fine with Proclamation, five years passe, the condition is broken, the Dis-
seisor entreteth, and Pericm concived that in such Case the Disseesee is
bounden, for by the Fine, and five yeares non-claim, the right of every stran-
ger is barred, and when the Disseisor entreteth for the condition broken, the
Fine is not annoyed, but rather confirmed, and former rights shall not be re-
vived. Windham to the same intent, and voucheth the Books before remem-
bered, and that the meaning of the Statute of 32 H. 8. made upon the Statute
of 4 H. 7. was to bind the Issue in tail as strongly as the heire of Tenant in
fee simple was bound at the common Law, and that Fines by conclusion are
as fully within the purview of that Statute as Fines in verity, for Fines by
conclusion are Assurances ; And as to the objection against our Fine, that it

is not fine levatus, because that partes ad finem nihil habuerunt, &c. the same is no reason, wherefore this Fine shalbe not be fine levatus, for these words fine levatus, to the eternall forme of a Fine are to be taken as to a Fine levied, com. Edmundo Anderson & socij suis, where all the Justices ought to be named, and so it seemed also to Periam and Anderson. Our case had little relliance to the Case where Tenant in tail makes a Lease according to the Statute of 32 H. 8. if he be not seised at the time of the demise, it is void, for the Statute speakes seised, in tail; but so are not penned the Statutes of 4 H. 7. & 32 H. 8. as 4 H. 7. a Fine levied shall bind privies, & strangers, &c. and 32 H. 8. Fines levied of any Lands entayled to the Convolz or any of his Ancestrys, and it is not a Fine in respect of the possession which passeth by the Fine, but in respect of the Convolz and Agreement.

And Tenant in tail by these Statutes hath as great power to bind the right of the entail, although he cannot meddle with the possession, as the Tenant in Fee simple at the common Law.

Anderson to the same intent, All the matter resteth upon this point, if the Issue in tail be privy or not, for if he be privy, then clearly he is bounden. And as to that, the Issue in tail before the Statute of 32 H. 8. hath been always accounted privy. See 29 H. 8. Dyer 32. Tenant in tail of the gist of the King leveth a Fine, the same shall bind his Issue, for they are privy. And he argued much upon the said Cases cited by the other Justices before, and especially upon the said Case of Stowell and the Lord Zouch, how that the Issue in tail is there holden privy; and that the Statute of Fines ought to be taken and construed to enforce the operation of Fines against former rights, and for the establishment of the present possessions and estates. And by him divers rights and persons are excepted by the said Statute, but this right in giste of possession, nor the Issue in tail, whose Ancestor being out of possession leaveth the Fine is not excepted, therefore both of them comprehended in the Statute. And in his argument he stood much upon it, how dangerous a matter it shalbe to receive such averments and allegations which go meetly in avoidance of Fines, for so every Fine might fall in the mouth of Lay. Gent. which would be very inconvenient. And he concluded his Argument with this Case. Tenant in tail doth discontinue, and discealeth his disseale, and levieth a Fine, the discontinue before the proclamations are entred, the proclamations are made, Tenant in tail doth re-enter, and dyeth seised; against this Fine his Issue shall not be remitted. See as to the averment 3 H. 6. 27. 33 H. 6. 18. 42 E. 3. 20. 8 H. 4. 8. 12 E. 4. 19. by Fairfax and Needham, and fol. 15. by Brian and Choke. And afterwards Judgment was given, that the Demandant shoulde be barred.

Intr. P. sch. 29 Eliz. Rot. 2112. In Commissarii Banco.

C III. Gunerston and Hatchers Case.

Charles Duke of Suffolk was seised of three parts of the Manors of D. and Avowry, Poole was seised of the fourth part of the said Manors, and afterwards the Duke granted out of the said three parts a Rent charge of five marks to Gunerston; and afterwards the said Duke of the said three parts did enfeoff Hatcher in Fee, after which Poole conveyed his said fourth part of the said Manors to the said Hatcher in Fee, and afterwards Hatcher being seised, ut supra, reciting the said several purchases, especially the said fourth part he devised to Katherin Hatcher at Will. and Gunerston distresned the Castel of Katherin Hatcher for the arrearages of the said Rent, and in a Replebit abolved the distresse: and by the opinion of the whole Court the Avowry was not maintainable, for the fourth part of the said Manors, which was in the possession of

Poole, was not charged with the Rent, and although all the Mannor be now in the possession of Hatcher, yet the Mannor is not so consolidated nor united by this unity of possession, but that the owner might wel enough single out, eadem quartam partem, and grant it, and the grantee shall hold the same discharged, as the said Poole held it; and the beasts of the said Katherin shall not be distressed, and so Judgment was given against the A'duant.

Officiorum. 11. 11. 11.

C IV. Mich. 29 and 30. Eliz. in Communi Banco.

H. 2.

Voucher.

It was moved by Serjeant Walmsley, If a common Recovery be to passe at the Barre, and the Tenant is ready at the Barre and boucheth to warr. A, for whom one is ready at the Barre to appear for the bouchee by his Warrant of Attorney; It was holden, that this appearance is merely void, for in such case the bouchee ought to appear in person, because without summons, but where summons issueth, and the same is entred upon the Roll, there may the bouchee at the Return appear in person, or by Attorney at his Election. And that was the clear opinion of all the Justices, and also of the Preignories.

Officiorum. 11. 11. 11.

Mich. 29. and 30. Eliz. in Communi Banco.

H. 2.

C V. Keys and Steds Case.

Formdon.

In a Formdon by Keys against Sted, the Case was, that Stedd and his Wife were Tenants for life, the Remainder over to a stranger in Fee; and the Writ of Formdon brought against Sted only, who made default after default, whereupon came his Wife and prayed to be received to defend her right; which was denied her by the Court, for this Recovery doth not bind her, and it is to no purpose for her to defend her right in that Action which cannot here be impeached; Whereupon he in the Remainder came and prayed to be received, and the Court at first doubted of the Receipt, soasmuch as if the Defendant shall have Judgement to recover; he in the Remainder might falsifie the Recovery, because his estate, upon which he prayeth to be received, doth not depend upon the estate impledged, scil. a sole estate, whereas his Remainder doth depend upon a joint estate in the Husband and Wife, not named in the Writ; But at the last, notwithstanding the said Exception, the Receipt was granted. See 40 E 3. 12.

Falsifier of Recovery.

Mich. 29. and 30. Eliz. In Communi Banco.

C VI. Liveseys Case.

In a Writ of Right against Thomas Livesey of the Mannor of D, & de duas partibus Custodiz Forrestie de C. the Tenant did demand the view, and he had it, and return was made, and now the Writ of Habere facias visum, was viewed by the Court, and it was, Visum Manerii & duarum partium Custodiz, &c. And it was holden by the Court not to be a sufficient view, for the Forrest it self ought to be put in view, scil. the whole Forrest, and not due partes tantum, as where a Rent or Common is demanded, the Land out of which the Rent or Common is going ought to be put in view; and there a Writ of Habere facias visum de novo issued forth.

View.

Mich. 29. and 30. Eliz. In Communi Banco.

C VII. Germys Case.

Ermy brought Debt upon a Bond against A as Executor, and the Case Deb.
Gives, That the Testator of A by his Will did appoint certain Lands, and
named which, should be sold by his Executors, and the moneys thereof arising
distributed amongst his Daughters when they have accomplished their ages of
one and twenty years; the Lands are sold, if the moneys thereof being in the
hands of the Executors until the full age of the Daughters shall be assets to
pay the debts of the Testator: And by the clear opinion of the whole Court, After
the same shall not be assets, for that this money is limited to a special
use.

C VIII. Mich. 29. and 30. Eliz. in Communi Banco.

In an Action of Debt upon an Obligation, the Defendant saith, that the
Plaintiff shall not be answered, for he is outlawed, and dwelt the Out-
lawry in certain, by the name of I S of D in the County of, &c. The Plain-
tiff saith, that at the time of the suit begun against I S, upon whom the
Out-lawry was pronounced, the said I S, now Plaintiff, was dwelling at S,
absoe hoc, that he was dwelling at D: Vide 21 H. 7. 12. And it has holden
a good Replication, to avoid the Out-lawry without a will of Error, by An-
derson. 20 E. 4. 12. For if he were not dwelling at D then he cannot be inten-
ded the same person: See 39 H. 6. 1.

C IX. Mich. 29. and 30. Eliz. in Communi Banco.

It was agreed by the whole Court, and affirmed by the Proxymaries,
That if in Actions the Defendant be adjudged to account, and be taken by a
Capias ad compotandum, and set to mainprise, pendent the Account before the
Auditors, and doth not keep his day before them, that now a Capias ad compu-
tandum de novo, shall issue forth against him.

Mich. 29. and 30. Eliz. In the Common Pleas.

C X. Glosse and Haymans Case.

John Glosse brought an Action of Trespass, vi & armis, against John Hay-
man, who pleaded the general Issue, and the Jury found this special matter,
That the Plaintiff was a Grocer in Ipswich, and there held a Shop of Groce-
ry, & quod illa repositi fiduciam in the Defendant, to sell the Grocery Wares
of the Plaintiff in the said Shop: And further found, that the said Defendant
being in the said Shop in form aforesaid, cepit & asportavit, the said Wares,
and did convert them, &c. It was moved in Arrest of Judgement, that this
Action, vi & armis, upon this matter doth not lie, but rather an Action upon the
Case. But the Court was clear of opinion, that the Action doth well lie,
for when the Defendant was in the Shop aforesaid, the Goods and Wares
did remain in the custody and possession of the Plaintiff her self. And the
Defendant hath not any Interest, possession, or other thing in them, and thence-
fore if he entermedle with them in any other manner, then by uttering of
them

Trespass, vi
& armis, a-
gainst a Ser-
vant for carry-
ing away his
Masters goods

them by sale, according to the authority to him committed, he is a Trespassor; for he hath not any authority to carry the Wares out of the Shop not sold, but all his authority is within the Shop. And Rodes put the Case of Littleton 25. If I deliver to another my Sheep, to another to manure his Land, or my Oxen to plow his Land, and afterwards he kills them, I shall have an Action of Trespass against him: And afterwards Judgement was given for the Plaintiff.

Mich. 29. and 30. Eliz.

C XI. Martin and Stedd's Case.

Richard Martin, Alderman of London, brought an Action upon the Case against Stedd, and declared, That whereas the Queen by her Letters Patents, dated the 27. of August, anno 24. of her Reign, had granted to the Plaintiff the Office of Master of the Mint, throughout all England, to exercise the said Office, secundum formam quarundam Indent. betwixt the said Queen & the said Plaintiff confidendarum, and that in January following the said Indenture was made, by which it was agreed betwixt the said Queen and the Plaintiff, that the money, in posterum, should be made in such manner, &c. according to the true Standard; and declared, that he had duly and lawfully made all the money according to the said Standard: Yet the Defendant, machinans &c. had slanderously spoken and given out speeches in these words. Mr. Martin hath not made the money as good and fine as the Standard, by an half penny in the ounce, and so he hath saved four thousand pounds. It was objected against this Declaration by Walmesley Serjeant, that here the Plaintiff hath declared upon the Letters Patents; and the Office given by the Letters Patents ought to be exercised according to the Indenture, &c. And here appears upon the Declaration no Indenture, for no enrolment of such Indenture is shewed, and if it be not enrolled, then there cannot be any Indenture betwixt the Queen, &c. and then the Queen cannot have an Action upon it for want of enrolment. See 21 H. 7. 21. 1 H. 7. 28. and 31. 5 E 4. 7. and also if there be not a sufficient Indenture, then the Plaintiff is not Master of the Mint, and then also there is not any new Indenture: And then the Plaintiff ought to make the money according to the old Standard, and then might the Defendant well justify the words.

Another Exception was taken, because the Plaintiff is not at any damage, for the Queen cannot have against him but an Action of Covenant upon the said Indenture, because the Defendant hath not made the money accordingly, which matter is not actionable, no more then if the Farmer of the Queen had brought this Action against one, for speaking that he had broken the condition or covenants of his Lease. And as unto these words, So that the Defendant hath saved four thousand pounds, those words are not actionable, for it may be he hath saved this four thousand pounds to the Queen; and such construction the Judges ought to make of such ambiguous words in such cases, scil. in optimam partem. It was adjoined.

Mich. 29. and 30. Eliz. in the Common Pleas.

C XII. Mounson and Wests Case.

Challenge.

In an Action of Trespass between Mounson and West, the parties were at Issue, and now at the Return of the Pannel the Defendant challenged the Assay; because it was made by Bartholomew Armin, who took to wife the

Colen German of the Plaintiff, & ex ea, had Issue living, the mother being dead: And upon this challenge the Plaintiff did demurre in Law; And it seemed to the Lord Anderson, that it is not a principal challenge, but only to favour. For the matter of the challenge is not consanguinity, but only affinity: And so it seemed to Periam. And Rhodes cited a case adjudged in the Kings Bench, Markham brought an Action upon the Case against Lee, who at the Nisi Prius challenged the Array, because the Sheriffs wife was sister to the Plaintiffs wife, and that was before the Lord Dyer at Nottingham, and that challenge was holden there, not to be a principal challenge; upon which Error was brought in the Kings Bench: And Error assigned in that, and for that cause the Judgment was reversed: And by Windham the Writ of Venire facias is, quia nulla affinitate, &c. so as affinity is presumed in Law not indifferent. And by Anderson that is to be intended of the Jurors, and not of the Sheriff. 22 E 4. 2. The Array was challenged, because that the Sheriff, &c. had married A Daughter of Eliz. Sister of the Mother of the Plaintiff, and that was holden a principal challenge 10 H 7. 7. 26 E 3. 21. And afterwards at another Term the Case being moved, Anderson, Rhodes and Windham were clear of opinion, that it is a principal challenge, but Periam bacavit, and put a difference betwixt consanguinity and Affinity, for affinity is not a principal challenge unlesse it be averred, that the Issue, &c. is inheritable to the Land. And Anderson put the Case in 14 H 7. 2. Where one challenged, because one of the Jurors had married the Mother of the Defendant, it was holden a principal challenge. And 15 H 7. 9. where the challenge was for that the Brother of the Wife of the Defendant had married the Daughter of the Sheriff.

Mich. 29. and 30. Eliz. in the Exchequer.

C X I I I. Sir Thomas Greshams Case.

Sir Tho. Gresham being seised of the Mannors of Walsingham and Milham in the County of Norfolk, 12 Eliz. enfeoffed B and C to certain uses, and that was with clause of Revocation upon the tender of forty Shillings, and that after such Revocation he might limit new uses; and afterwards the year following, Sir Tho. Gresham made the like conveyance of his Lands in the County of Suffolk to the said persons, to the like uses, upon like clause of Revocation upon the tender of forty Shillings, Sir Thomas tendered to the said Feoffees one sum of forty Shillings to revoke the uses raised upon both the Investments; and afterwards raised divers uses of divers of the said Mannors holden in Capite, and afterwards Sir Thomas died: And afterwards it was resolved by the opinion of the Justices, that by that tender the uses were not revoked, but that the Revocation was utterly void, soz two several sums of forty Shillings ought to have been tendered, soz they were several Indentures and could not be satisfied by one sum. After which by a private Act of Parliament, 23. Eliz. the said Revocation was enacted and adjudged to be good and sufficient in Law. And now the Lady Gresham was called by process into the Exchequer for a Fine due to the Queen for the said alienation, because that now the said uses newly raised were good, and the said Manors possessed according to the limitation of them, soz now the Revocation is good, because done by the said Statute which recited the whole special matter, and that soz want of a sufficient Tender, the Revocation was void in Law, and also reciting, the new uses which were declared for the payment of his debts, and many honorable Legacies, and also for the security of those who had purchased underneath the said new uses: For remedy whereof it was enacted, & quod predict. Revocations bona & sufficietes in lege habeantur, reputentur, & recognoscantur. And

Revocation of
uses.

Fine for Alice
nation.

it was argued by Coke, that upon the matter, no Fine is due, for all those new uses took their essence and effect by that Act of Parliament, to which the Queen her self is a party, and the principal Agent, and therefore against her own Act she shall not claim a fine, &c. And also the alienation without licence is a wrong and trespass; and an Act of Parliament cannot do wrong, and if partition be made betwixt Parteners by Act of Parliament, no fine is due to the Queen, which was in ure, 23. Eliz. for by Parliament then a Partition was made betwixt the Co-heires of the Lord Latimer, and I do not know that any fine hath been demanded for it.

Mich. 29. and 30. Eliz. in the Common Pleas.

C X I V. Bret and Sheppards Case.

Debt.

Bret brought Debt upon a Bond against Sheppard, the Bond was endorsed, Upon condition, that where the Defendant was arrested at the suit of one A, if now the Defendant shall appear in the Kings Bench, where the process is returnable, that then, &c. And the Defendant sayd in fact, that he had appeared, secundum formam & effectum conditionis supra dict. & hoc petit quod inquiratur per patriam, & predict. Brett similiter: It was moved, that the parties should replead for this matter, upon which they are at Issue, scil. the appearance is not touchable by Jury, but by the Record: And the Court was clear of opinion, that the parties should replead for the cause aforesaid: And it was moved by the Lord Anderson, that if A be bound to appear in the Kings Bench at such day, and A at the said day goes to the Court, but there no process is returned, then the party may go to one of the cheif Clerks of the Court, and pray him to take a Note of his appearance: And by Nelson, we have an ancient form of entry of such appearances in such Cases. Ad huic diem venit I S, & propter indemnitatem suam & Manuscriptorum suorum petit quod competentia sua in Curia hic recordetur. And see for the same 38 H 6. 17. And afterwards the Lord Anderson, inspecto Rotulo, ex assensu sociorum attinxerat a Repleader: And so by Nelson, it hath been done oftentimes here before, and put in ure: The same Law is, where at the day of appearance no Court is holden, or the Justices do not come, &c. he who was bound to appear, ought to have an Appearance recorded in such manner as it may be; and if the other party pleadeth Nul iei Record, it behoveth, that the Defendant have the Record ready at his peril, for this Court cannot write to the Justices of the Kings Bench, for to certifie a Record hither.

Mich. 29. and 30. Eliz. in the Common Pleas.

C X V. Baxter and Bales Case.

Debt not extint by administration.

Baxter brought Debt upon a Bond as Executor of I against Bale; who pleaded that the Plaintiff after the death of the Testator was cited to appear before the Ordinary or his Commissary to have the Will of the said I, and at the day of his appearance he made default, upon which the Ordinary committed Letters of Administration to the Defendant, by force of which he did administer, so the debt is extint, &c. but the whole Court was clear of opinion, that the debt was not extint, for now by the probate of the Will the administration is defeated, and although the Executor made default at the day which he had by the Citation before the Ordinary, yet thereby he is not absolutely debarred, but that he may resort to the probating of the Will whensoever he pleaseth; But if he had appeared and renounced the Executordship it had

been

been otherwise; and the debt is not extint by the Administration in the mean time.

C X V I I . Mich. 29. and 39. Eliz. in the Common Pleas.

I P, a Franchise the parties are at Issue upon a matter triable out of the Franchise. And it was moved, if now the Record shold be sent into the Common Pleas, and there tryed, and after tryal sent back into the Franchise: Which Periam and Anderson utterly denied; and by Periam, there is no reason that we shold be their Ministers to try Issues joyned before them: And it is not like, where a Liberty or Franchise a Forzein Woucher is to warrant Lands, in such cases we shall determine the Warrant; but that is by a special Statute, scil. the Statute of Gloucester cap. 12. And Nelson Preigr notwithstanding said, that such an Issue was tryed here of late. Quod nota.

Mich. 29. & 30. Eliz. At Serjeants Inne.

C X V I I . The Earle of Arundell, and the Lord Dacres Case.

Philip Earle of Arundell, and the Lord William Howard his Brother mar-
ryed the Daughters and Co-heirs of the late Lord Dacres: And now came
Francis Lord Dacres as heire male of the said Family, and claimed the Inhe-
ritance, &c. And after long sute betwixt both parties, they submitted them-
selves to the award of Gilbert Lord Talbot, and of Arthur Lord Grey of Wil-
ton, and Windham and Periam Justices: And before them at Serjeants Inne,
the matter was well debated by the Councill learned on both sides, and as unto Greystock Lands, parcell of the Lands in question, the Case was. What
Tenant in tail makes a Feoffment in fee unto the use of himself for his life,
the Remainder in tail to his eldest Son, with divers Remainders over, with
a Proviso, that if any of the Entailtees doe any act to interrupt the Case of any
entail limited by the said Conveyance, that then the use limited to such per-
son shold cease, and goe to him who is next inheritable; And afterwards
Tenant in tail dyeth, his eldest Son to whom the use in tail was first limited
enteth, and doth an Act against the said Proviso, and yet hold himselfe in and
make Leases, the Lessors enter, the Lessor dyeth seised, his Heir being with-
in age, and in ward to the Queen; It was holpen by Shruleworth Serjeant,
Yelverton, Godfrey, Owen, and Coke, who were of Councill with the Heirs
generall of the Lord Dacres, that here is a Remitter, for by this Act against the Remitter.
Proviso, the use, and so the possession doth accrue to the enfant Son of him, to
whom the use in tail was limited by the Tenant in tail: Then when the Ten-
ant in tail after his said Feoffment holds himselfe in, this is a disseisin, for a
Tenancy by sufferance cannot be after the cesser of an estate of Inher-
itance; But admit that he be but a Tenant at sufferance, yet when he
makes Leases for yeares, the same is clearly a disseisin, and then upon
the whole matter a Remitter, and although the Enfant taketh by the Sta-
tute, yet the right of the faile decending to him afterwards by the death of his
father doth remit him, as if Tenant in tail maketh a Feoffment in fee to
the use of himselfe for life, the Remainder in tail to his eldest Son inheritable
to the first in tail, notwithstanding that the eldest Son takes his Remainder
by the Statute, and so be in by force thereof, yet when by the death of his Fa-
ther, the right of the Entail descends to him; He is remitted.

Mich. 29. & 30. Eliz. In the common Pleas.

C XVIII. Butler and Ayres Case.

Dower.

Butler and his wife brought a writ of Dower against Thomas Ayre, some
and Heir of Bartholmew Ayre, first Husband of the said Margaret wife of
the Plaintiff, and demanded Dower of Lands in A and B, the Tenant plead-
ed, never seised que Dower, and the Jury found that the said Bartholmew was
seised during the Coverture, de omnibus tenementi infra script. preterquam,
the Tenements in (sic ut dicta Margareta dotari potuit) Exception was ta-
ken to this Verdit; because that this preterquam, &c. doth confound the Ver-
dit, to which it was said by the Court, that the preterquam is idle, and surflu-
sage, for it is of another thing then that which is in demand, and the seisin of
of the first Husband of Lands in A and B is confessed, and the (preterquam)
works nothing: Another matter was objected, because here the Jury have
assessed damages, as in case where the Husband dyeth seised, the which dying
seised is not found by the Verdit: In which Case it was said by the Court,
the Demandant might pray Judgment of the Lands; and release damages,
or the Demandant may aver that the Husband dyed seised, and have a writ
to enquire of the damages, quod omnes Pregnotarii concesserant,

Mich. 29. and 30. Eliz. In the Common Pleas.

C XIX. Michell and Hydes Case.

Dower.

Dower by Michel and his wife against Lawrence Hyde, who appeared
upon the grand Cap; And it was because that the said Hyde in truth
was but Lessee for yeares of the Land of which, &c. in which case he might
plead non-tenure, if now he might wage his Law of non-summons, so as the
writ be abated; for by the wager of Law he hath taken upon him the Ten-
ancy, and affirmed himselfe to be Tenant, 33 H. 6. 2. by Prisoit, to which it
was said by Rhodes, and Windham Justices, that here the Tenant being but
Lessee for yeares is not at any mischeif, for if Judgement and Execution be
had against him, he notwithstanding might afterwards enter upon the De-
mandant. Another matter was moved, That where the writ of Dower
was, de tercia parte Rectorie de D. upon that the grand Cap issued, Capa in
manum nosram tertiam partem Rectorie, and the Sheriff by colour of this
writ took the Tythes seised from the nine parts, and carried them away
with him: But it was agreed by the said Justices, that the same is not such
a seizure as is intended by the said writ, but the Sheriff by virtue of such
writ, ought generally to seize, but leave them there where he found them.
And the Court was in opinion to commit the Sheriff to Prison for such his
misdeemeanors.

Mich. 29. and 30. Eliz. In the common Pleas.

C X X. Hamington and Rydears Case.

Debt.

Richard Haming, Executor of Isabell Haming, brought Debt upon an Oblis-
sation against Rydears, the Case was, that Kidwelly was seised, and leased
for yeares to John Hamington Husband of Isabell, and afterwards John Ham-
ington being so possessed, by his will devised, that the said Isabell should have
the

the use and occupation of the said Land for all the years of the said Term as shee should live, and remaine sole, and if shee dyed or marries, that then his Son should have the resigne of the said Term not expired; John dyed, Isabell Devizes entered, to whom the said Lawr. conveyed by Feofement the said Land in Fee, in the Indenture of the said Conveyance Lawr. covenanted that the said Land from thence should be clearly exonerated, de omnibus prioribus, barganijs titulis juribus & omnibus alijs oneribus quibuscumque, Isabel took to Husband, the said entith: If now the Covenant be broken was the question, it seemed to Anderson at the first motion, that this possibility which was in the Son at the time of the Feofement, was not any of the things mentioned in the Covenant, scil. former bargaines, title, right, or charge; But yet it was conceived by him that the word bargaine did extend to it, for every Lease for years is a contract, and although that the Land at the time of the Feofement was not charged, yet it was not discharged of the former contract: And by Windham, if I be bounden in a Statute-Mapple, and afterwards I bargaine and sell my Lands, and covenant (ut supra) here the Land is not charged, but if after the condition contained in the defence be broken, so as the Consesse extends, now the Covenant is broken; And by him, the word (charge) doth extend to a possibility, and this possibility might be extint by Livery as all agreed, but not blancket by grant, or extinguished by release as it was lately adjudged in the Case Covenant of one Carter: At another day, it was argued by Walmsley, and he much relied upon the words (clearly exonerated) utterly discharged, or altogether exonerated, and without doubt it is a charge which may happen, and if it may happen, then the Land is not clare exonerated: And also former bargaines, doth extend to it, and the Term is not extint by the acceptance of the Feofement aforesaid of Kidwelly, and although, that at the time of the feofement it was but a possibility, and no certainte interest, yet now upon the marriage of Isabell, it is become an annall burthen and charge upon the Land, and he cited a Case adjudged, 8. Eliz. A man seised of Lands grants a Rent charge to begin at a day to come, before which day he bargaines and sells the Lands, and covenants that the said Lands are discharged of all charges, in that case when the day when the Rent ought to begin is incurred, the Covenant is clearly broken, for the Lands were not clearly exonerated, &c. At another day the Case was moted at the Bar: And Anderson openly in Court declared, that he and all his companions were agreed, that the Land at the time of the Feofement was not discharged of all former Rights, Titles, and charges, and therefore commanded, that Judgement should be entered for the Plaintiff.

Hill. 30. Eliz. in the Kings Bench.

C X X I. Howell and Trivanians Case.

Howell brought an Action upon the Case against Trivanian in the Common Assumpsit. He pleads, and declares, that he delivered certain goods to the brother of the Defendant, who made the Defendant his Executor, and dyed, after which the Plaintiff came to the Defendant, and spake with him concerning the said Goods, upon which communication and speech the Defendant promised the Plaintiff, that if the Plaintiff could prove, that the said goods were delivered to the Testator, that he would pay the value of them to the Plaintiff: And the Declaration was in consideration, that the said goods came to the hands of the Testator, and also afterwards the goods came to the Defendants hands, and upon non Assumpsit pleaded, It was found for the Plaintiff, and Judgment given: And afterwards Executor was brought in the Kings Bench, and Executor assigned, because that the Plaintiff had not averred in his Declaration, that he had proved the delivery of the said goods to the said Testator, for the words of the promise are, si probare posuisse: And also it was assign-

ed for Error, that here is not any consideration upon which this promise could receive any strength, for the Defendant hath not any profit or advantage there-by, scil. by the baylment of the said goods to the Brother of the Defendant; And also it is a thing before executed, and not depending upon the promise, nor the promise upon it: As the Case reported by the Lord Dyer 10. Eliz. 272. The Servant is arrested in London, and two men to whom the Master is well known, bail the said Servant, and after the Master promiseth to them for their freindship, to save them harmless from all costs and damages, and in an Action upon the Case brought upon that promise, the Plaintiff was barred, for here is not any consideration, for they bailed the Servant of their own head without the request of the Master, and the matter which is alledged for consideration is executed before the Assumpst, and the promise was not before the enlargement, and the said baylment was not at the instance, or request of the Master: And the Case of one Hudson was cited, adjudged in the Kings Bench: The Defendant in consideration that he was Administratoz, and naturall Son of the Testator, and that the goods of his Father have come to his hands, promiseth to pay the debt to the Plaintiff. And in an Action upon the Case upon that promise, the Defendant pleaded he made no such promise, and it was found that no goods came to the hands of the Defendant; And it was holden, that the consideration that he was Administratoz and Son to the Testator, was not of any force to mainaine the Action, and afterwards in the principall Case the Judgement was affirmed. And it was moved by Coke that Judgement should not be given against the Executoz of his own goods if he had not goods of the Testator, for the charge doth not extend beyond the consideration, i.e. That the goods of the Testator came to the hands of the Defendant, but Wray Justice was of opinion, that Judgement shall be of his proper goods, as in Case of confession: Kemp Secondary, if the Action be brought upon Assumpst of the Testator, Judgement shall be of the goods of the Testator, but of the promise of the Executoz, of his owne goods, but the Original Judgement which is now affirmed was general.

Hill. 30. Eliz. In the Kings Bench.

C X X I I. Savell and Woods Case.

The Case was; That a Parson did Libell in the spirituall Court against a Parishoner for Tythes of such Lands within his Parish, the Defendant came into the Kings Bench and summised, and that he and all thos whose estate he hath in the Lands out of which the Tythes are demanded, have used to pay every years five Millings to the Parish Clarke of the same Parish for all the Tythes out of the same place: And it was argued by Coke, that that could not be, for a Parish Clarke is not a person corporate, nor hath succession: But if he has prescribed, that they had used to pay it to the Parish Clarke to the use of the Parson, it had been good: Also he ought to shew, that the Parson ought of right to fine the Parish Clark, &c. And he cited the Case of Bushie the Parson of Pancras, who libelled in the Spirituall Court for Tythes, The Defendant to have a prohibition did prescribe, that he, and all those, &c. had time out of mind, &c. used to pay to the Vicar, &c: and at last a consultation was awarded because it was tryable in the Ecclesiastical Court for both parties as well Vicar as Parson, are spirituall Parsons, and the modus decimandi is not in question, but cui solvend. And at another day, it was agreed by the Justices, that of common right, the Parson is not tyed to fine the Parish Clarke, for then he should be laid the Parsons Clark and not the Parish Clarke: But if the Parson be tyed to fine such a Clark, and such a sum hath been used to be paid to the Parish Clarke in discharge of the Parson, the same had been a good prescription, and so by way of composition, and by Clench Tythes.

Tythes are to be paid to spiritual persons, but a Parish Clark is a Lay person: And afterwards the Court granted a Consultation.

Hill. 30. Eliz. in the Kings Bench.

C X X I I I. Higham and Reynolds Case.

In this Action of Trespass the Plaintiff declared, that the Defendant in March 158 Eliz. cut down six posts of the house of the Plaintiff at D. The Defendant doth justifie, because that the Free-hold of the house, 10 Aprilis 27 Eliz. was to I S., and that he by his commandment the same day and year did the Trespass, &c. upon which the Plaintiff did venture in Law, because the Defendant did not traverse, without that that he was guilty before or after. And the opinion of Wray was, that the traverse taken was well enough, because the Free-hold shall be intended to continue, &c. Vide 7 H 7. 3. But all the other three Justices were of a contrary opinion to Wray: But they all agreed, that where the Defendant doth justifie, by reason of his Free-hold at the day supposed in the Declaration, there the traverse (before) is good enough: And afterwards Judgement was given against the Defendant.

Hill. 30. Eliz. in the Kings Bench.

C X X I V. Kight and Footmans Case.

In this Trespass by Kight against Footman, the Case upon the pleading was, that one Margaret had issue two Sons, Richard and Thomas, and surrendered to the use of Richard for life, and afterwards to the use of Thomas in fee; they both, Thomas being within age, surrendered to the use of one Robert app. John in fee, who is admitted, Richard dyeth; Thomas dyeth, having issue A, who is also admitted, and enters into the Land, and if his entry be lawful, or that he be put to his plaint in the nature of a *Dum fuit infra etatem* was the Question. And Wray was clear of opinion that it was: And if a man seised of Copy-hold Land in the right of his Wife, or Tenant in tail of a Copy-hold doth surrender to the use of another in Fee, the same doth not make any discontinuance, but that the issue in tail and the Wife may respectively enter; and so was it holden in the Servants Case, when Audley, who afterwards was made Chancellor of England, was made Servant, and afterwards it was adjudged, that the entry of the case was lawful.

Mch. 29. Eliz. in the Exchequer.

C X X V. Sir Wollafton Dixies Case.

An Information was in the Exchequer against Sir Wollafton Dixie, upon the Statute of Usury: and upon not guilty pleaded: The Informer gave in evidence an Usurious contract upon a bargain of Mares: The opinion of the Court was, that the Information being exhibited for the loan of money, that the Evidence was not pursuing nor leading to the Issue. And yet the Jury against the opinion of the Court upon that evidence found the Defendant guilty. And it was moved in arrest of Judgement, that the Evidence did not maintain the Information, nor prove the Issue, ex parte Querentis, and it was said, there are three things within the Statute, i. three words,

i. bargain, loane, and chevizance, and these three are several things, and therefore, if the Information be conceived upon loane, and the Informer giveth in Evidence a corrupt bargain for cloth, as it is in this Case, the same doth not maintain the Information; So if the Information be granted upon usurious contract by way of mortgage, and giveth in Evidence an usurious loane, ut supra. But if the Information had been conceived generally, upon an usurious agreement, and giveth in Evidence a loane, the same is good enough, for every loan is an agreement.

Manwood, There cannot be any loane without bargain, nor any forbearing without bargain, for he contracts or bargains to do it, viz. to lend, or forbear: Bargain of forbearing is where the first day of payment is not kept and the parties have agreed for a further day for the payment, &c. And it appeareth in this Case, that it was a bargain to forbear a sum of money which should have been paid before; And the Information here is upon a bargain by way of loane, where was a bargain for forbearing. Fuller, this word (Bargain) in the Statute cannot be intended a bargain for wares or such things, and so distinct from the other two things, &c. If in Information upon loane, an usurious contract had been given in Evidence, that would not maintain the Information: And it was moved in this Case, if the time of the loane or forbearance of the money shall be accounted according to eight and twenty days to every moneth, or by the moneths in the Kalender, viz. January, February, &c. And it seemed to some according to the dayes as in case of the Statute of 23. Eliz. of Recusants, and others conceived contrary in both Cases. And Fuller said, That in the Case of policy of Assurance made to warrant a Ship, one was bound to warrant a Ship for twelve moneths; and the truth was, did not perish within the time of the twelve moneths being accounted according to eight and twenty dayes, but being accounted by the Kalender, as January, Feb, &c. it perished, &c. and it was laid and holden, that he had not forfeited his Bond. Gent Baron. If I lend one a hundred pounds without any contract for Interest, and afterwards at the end of the year he gives me twenty pounds for the loane thereof, the same is within the Statute, for my acceptance makes the offence without any bargain or contract. And by Clarke Baron, the place where the Defendant accepted excessive Interest ought to be shewed in the Information, but not the place where the contract for the loane or forbearance was made, for the same is not needful. See the Case betwixt Scratting and Morgan, Plowd. 200. for the setting down of the place in the Declaration, where the Extortion was committed: The Information here is by way of corrupt bargain and loane. The Defendant took at Dertford such a sum where the taking is layed, apud Dertford, but no place of the corrupt bargain or of the loane. And by Gent. If I lend Beesie for a year, and afterwards he takes further forbearance of another year beyond the rate, the same is within the Statute: but in all Cases, the place where the corrupt bargain was made ought to be certainly alledged: Manwood Baron, the Information is not good for the uncertainty of the place, where the corrupt bargain was made; and although there are many Presidents on the Informers part, it is not to purpose, for they were admitted without exception, and then they passed sub silentio, and so of no force. There are three things, or rather degrees of offences within the Statute. In usury, within the Statute, there ought to be corrupt loane, chevizance, or shift, 1. corruption, 2. he ought to take more than one hundred pounds, 3. it ought to be for lending or forbearing. There was a Case in this Court in the time of this Queen, that the Defendant had taken more then ten pounds in the hundred pounds, but in the Information no corruption in the bargain was alledged; and therefore Judgement was given against the Informer: But in the Case at Barre corruption is set forth in facto, and therefore as to that the Information is good enough: As unto the forbearing and giving of dayes of payment the same is alledged in the Information,

mation, but not according to the Statute, for the Statute is in the disjunctive, but the Information is in the copulative; here in our Case the issue is not guilty, under which general issue all the points of the Statute are included and ought to be tryed; as unto the corruption the same is not sufficiently laid, for no place is assigned where the corrupt bargain was made, ergo novisne, for it to be tryed, ergo, no triall can be, ergo, no issue for it, ergo, this point of the Statute doth not come in issue, nor can it be tryed upon the general issue, not guilty. Also he held, that all the Offence ought to be within the year, for if one make a corrupt bargain for this year, and ten years after he takes excessive usury, the same is not within the Statute to inform upon it. And in truth there is no such offence without corrupt bargain, so as he conceived, that the word (Lending) is a strange word, but where the Statute is forbearing or giving day of payment, and in the Information it is giving and forbearing in the copulative, that is good enough, for the one word enforceth the other, and is not double. Also the Information hath not shewed whose money it is, and therefore it is not good: And afterwards Judgement was given against the Informer; and a Writ of Error thereupon brought in the Exchequer Chamber. And it was argued by Popham Attorney General, that Judgment ought to have been given for the Queen and the Informer, for the shewing of the place where the corrupt bargain was made needs not to be alledged in the Information, for the offence punishable by the Statute is the receipt of excessive usury, and not the contract: And it was the Case of one Bird, 20 Eliz. where the Plaintiff shewed the place of the Receipt, and not of the contract, and yet had Judgement for the Queen, without any exception to it before Judgement, or Error after, for the contract is but inducement to the receipt, and it shall be tryed where the taking was; therefore it is not necessary to shew the place of the bargain: And it was adjourned.

Mish. 30. Eliz. in the Exchequer.

CXXVI. Saliard and Everats Case.

Thomas Saliard and Hen. Everat being Recusants convicted, and not having paid twenty pounds for every moneth, a Commission issued forth to enquire of their goods and Lands in the County of Suffolk, to levy thereon the Debt and penalty due to the Queen. And now the Commission being returned, the parties appeared, and by their Council shewed, that some of their Lands returned in the Commission are Copy-hold, and prayed as to those, Manus Dominus Reginz amoveantur, and that upon the Statute of 29 Eliz. cap. 5. concerning Recusants: viz. that upon default of payment of penalties, &c. which processe issued out of the Exchequer to take and seize all the goods, and two parts as well of all the Lands, Tenements and Hereditaments, Leases and Farmes of such Offender, as of all other the Lands, Tenements, and Hereditaments, liable to such seizure, or to the penalties aforesaid, by the true meaning of this Act, leaving the third part, &c. And Popham Attorney General moved, If a Recusant hath more then a thirty part of his Lands in Copy-hold land, if this Copy-hold as to the surplusage shall be liable to the penalty. Manwood the Baron conceived, that the Copy-hold is liable in this Case by the Statute, although not directly by expresse words, yet within the intent of it, and that by reason of these words al other the lands, &c. liable to such seizure, &c. Walmes. Serjeant, Copy-hold is not liable to a Statute Merchant or Staple, also if the Queen hath the Copy-hold, how shall the Lord have the services which the Queen cannot do: Also a Copy-hold is not an Hereditament within this Statute, which extends only to Hereditaments at the common Law, and not by custom: Also in Acts of Parliament which are enacted

for forfeiture of Lands, Tenements, and Hereditaments, by those words they shall not forfeit Copy-holds : Clark Baron, this Statute was made to restrain Recusants from taking the benefit of their Livings, and Copy-holds are their Livings as well as Free-holds, and by this Statute, the Queen shall not have every estate in the Copy-hold Land, but only the taking of the profits ; but the scope of the Statute was to impaire the Livings of Recusants, and that by driving of them for want of maintenance to repaire to the Church.

Walmsley, If the Statute had given to the Queen to seise two parts of their livings, then the Statute had extended to Copy-holds, Manwood, when a Statute is made to transfer an estate by name of Lands, Tenements, and Hereditaments, the Copy-hold is not within such Statute, but if the Lords Signory, his Customes and Services, are not to be impeached, or taken away by such Statute, then it is otherwise ; for such Statute doth not make another Tenant to the Lord ; And by him Copy-holder shall pay Subsidies, and he shall be asselld according to the value of his Copy-hold as well as of his Free-hold, and in this Case, the Queen is to have the profits of the Lands only, but no estate. At another day, the case was argued for the Recusants by Snagg Herjeant, and he said, that these words Lands, Tenements, and Hereditaments are to be construed, which are such at the common Law, not by Custome : If I give to one all my Lands, Tenements, and Hereditaments in D, my Copy-holds do not passe, and Statutes which are made to take away Possessions and Hereditaments out of persons ought to be strictly taken, and not by Equity : The Statute of 13. Eliz. of Bankrupts enacts, that the Commissioners may sell the Lands and Tenements of the Bankrupts, if the Statute had not made a further provision, the Commissioners could not sell Copy-hold Lands, but there are expresse words in the Statute for that purpose, i. e. as well copy as fee : Also the Statute of 13. Eliz. cap. 4. of Auditors and Receivers of the Queen doth not extend to Copy-holds : And it shoulde be a great prejudice to the Lords of such Copy-holds, that the Queen shoulde have the Lands, Popham, the intention of the Law sometimes causes a liberall construction of a Statute in a letter of it ; sometimes a strict and precise expositi-

What Statutes extend to Copy-holds; and here it appeareth, that the intention of the Statute was, that the Queen shoulde have all the goods of the offender, and two parts of the Lands, &c. Leases and Farmes, and the Recusant but the third part of all his Lands only ; And therefore the Recusant is not to have any other thing but only that which is allotted to him by the Statute, and that is the third part which is all the maintenance which the Law allows him, and then if Copy-holds be not within this Statute, a Recusant who hath great possessions in Copy-holds, and hath no Free-hold shoulde be dispunishable, and hath his full maintenance against the meaning of the Statute : And he said that many things are within the meaning of a Statute, which are not within the words, as Bonds, Obligations and Specialties made to Recusants, shall passe to the Queen by this Statute by force of the word, goods, according to the meaning of the Statute, and all personall things are within the Statute, &c. profits of the Lands, Abbayes, and the like ; and the very scope of the Statute was to take away from Recusants all personall things whatsoeuer, and two parts of reall things, as Leases, Farmes, Lands, Tenements, &c. with the intent that with the superfluity of their goods and possessions, he shoulde not maintaine Jesuits, and Seminary Preists, people more dangerous then the Recusants : And by him, Lands in ancient demesne are lyable to the use, penalties by the Statute, although not by expresse words ; So if a Recusant hath Lands extended by him upon a Statute acknowledged unto him, that Interest is not properly a Lease, or Farme, yet it is Land within this Statute lyable, &c. And if I be Tenant by Elegit, or Statute, &c. of Lands in D, not having other Lands in the said Towne, and I grant all my Lands in D, my Interest, ut supra, shall passe

passe, contrary; If I have other Lands there: And I grant, that if I have Copy-hold Lands in D, and none other, and I grant all my Lands in D, Copy-hold Land shall not passe by such assurance; because that Copy-hold cannot passe but by surrender; If I put out a Copyholder out of his Lands, the same is a Distress, to the Lord of whom the Copy-hold is holden: And if I leby a Fine of such Lands and five yeares passe, not only the Lord is bounden as to his Free-hold and Inheritance, but also the Copy-holder for his possession, for the intent of the Statute of 4 H. 7. was to take away controversies, & sicutibus finem imponere, and contention may be as well for Copy-hold as for Land at the common Law: He who hath a Lease for yeares to begin at a day to come, he who hath the Freehold thereof is disseised, the disseisor lebyeth a Fine, five yeares passe, he who hath the Free-hold is bound by it, but not he who hath the Interest for years in futuro, as it hath been lately adjudged; But he said; That if that point were to be handled againe, the Law would be taken to the contrary, but it is clear that a Lease in possession shall be bound by such Fine; And as unto any prejudice to the Lord it is clear, that notwithstanding that the Queen hath the Copy-hold Land, yet the Lord shall have the Rent during the possession of the Queen, which is the most valuable part of the services of the Copy-holder; the Statute of 1 E. 6. of Chantries, doth extend to Copy-hold, by the general words, Lands, Tenements, and Hereditaments, soj otherwise the Proviso which excepts Copy-holds were not necessary: And in our Statute, the words are Lands, Tenements, and Hereditaments which are forceable words, which proves that our exposition to extend it to Copy-holds is proper and agreeable to the Statute, and this in the first branch of it, for Copy-hold is some Land, Tenement, or Hereditament, the clause in this branch of the Statute is, and also all other the Lands, Tenements, and Hereditaments liable to such seizure, &c. the same is to be meant of such Lands which are bound with clause of revocation, of which is spoken in the former part of this Statute. He who departs out of the Realme against the Statute of 5 R. 2. shall forfet his goods, and thereby his debts also: The King grants, omnia bona & cuncta sellorum; Debts of Felons shall passe; Ergo Copy-holds also, by the name of Lands, Tenements, &c. as well as debts by the name of goods: In our Case, the meaning of the Statute was, that the Queen should have two parts of the whole estate of the Kersman, be it Copy-hold, Ancient Homelne, &c. If upon the Statute of Bankrupts, a Copy-hold estate be sold to the King, the King shall pay the Rent, but shall not doe any of the services, and in so much the Lord shall be prejudiced; patiatur etiam & hic, rather then Kersmans should not be punished, and it is not a strange thing in Law, that the Lord of a Copy-holder should be prejudiced for the offence of his Tenant, as where a Copy-holder is outlawed, the King shall have the profits of his Copy-hold Lands, and the Lord hath not any remedy for his Rent,

Par. 30. Eliz. In the Kings Bench.

CXXVII. Stebbs and Goodlacks Case.

Betwixt Stebbs and Goodlack, the Case was, the Parson of Letcome in the County of Berks, libelled in the Spiritual for Tythes, the Defendant, nor avoided shewed, that the custome of the Towne of Letcome is, that the Parson shall have for his Tythes the tenth Land sowed with any manner of corne, and he shall begin his reckoning alwayes at the first Land which is next to the Church, &c. The Parson shewed that the Defendant, by fraud and cobin sowed every tenth Land which belonged to the Parson, ut supra, very ill and with small quantity of corne, and did not dunge or manure it as he did the other nine parts, by meanes whereof, whereas the other nine every of them

yeilded eight cocks, the tenth yeilded but three cocks, and for this matter the Parson libelled in the Spirituall Court and confessed the custome, but for abusing of the custome prayed to have his Tythes in kind, the Defendant prayed a prohibition, and the Parson afterwards a consultation: And the opinion of Wray Justice was that the custome was against common reason, and so void, but if it be a good custome, then the Parson shal have the Action upon the case.

Pasch. 30. Eliz. in the Kings Bench.

C X X V I I L Rumney and Eves Case.

Copy-holder. **I**n Ejectione firmæ by Jane Rumney against Lucie Eve, it was holden, that if customary Land do descend to the younger Son by custom, and he enters and leaseth it to another, who takes the profits, and after is ejected: That he shall have an Ejectione firmæ without any admittance of his lessor or presentiment that he is heir. For which the Defendant shewed, that there were thirty yeares incurred betwixt the death of the Father, and the making of the Lease, so that here is supina negligencia, which shall disable his person to make any demise, quod fuit concessum. In answer of which it was said, that the Lessor at the time of the death of his Ancestors was but of the age of two yeares, and that after his full age no Court had been holden so long time, and that at the first Court that was holden, which was of late, he prayed to be admitted, but the Steward refused to admit him; and the same was holden a good excuse of his negligence: And it was holden, that the Plaintiff ought not to shew that the Lease is warranted by the custome, but that shall come of the other side; and so it had been lately adjudged, which Wray granted: And by him, if a Copy-holder surrender in extremis to the use of himself so long, &c. If he shall be well again, the surrender shall stand, for he hath reserved an estate to himself. It was further holden in the Case, that if a Copy-holder dyeth, his Heir within age, he is not bound to come at any Court during his non-age to pray admittance, or to tender his Fine: Also if the death of the Ancestors be not presented, nor proclamations made, he is not at any mischeif, although he be of full age.

Pasch. 30. Eliz. in the Kings Bench.

C X X I X. Saint-John and Petits Case.

It was covenanted betwixt Saint-John and Petit, that Saint-John should present Petit to the Church of A; and that afterwards Petit should lease the Parsonage to Saint-John, or to any other person named by him, and that the said Petit should not be absent by eighty dayes, and that he should not resign; and Petit was bound to perform those Covenants, and Petit is presented to the Benefice: Saint-John brought an Action upon the Obligation, pretending, that he could not enjoy his lease by reason of the absence of the said Parson, &c. And the Lease was made to the Curate at the nomination of Saint-John: The Parson said, that the Obligation is void by the Statute of 14 Eliz. cap. 11. See the Statute, All Leases, &c. made by any Curate shall be of no better force, then if they had been made by the beneficed Parson himself. Tantfeld by 13. Eliz. 20. When a Parson leaseth to his Curate, who leaseth over. The Statute doth not make the Lease void by any absence of the Parson, but of the Curate by forty dayes. Quare. For that it seemeth, that by the Statute of 14 Eliz. the Curate cannot lease, &c.

Pasch.

Pasch. 30. Eliz. in the Kings Bench.

C XXX. Gates and Halliwell's Case.

BETWIXT Gates and Halliwell the Case was, one having two Sons, devised, that his eldest Son with his Executors should take the profits of his Lands until his youngest Son should come to the age of two and twenty years, and that then the said youngest Son should have the Land to him and the Heires of his body: It was holden clearly by the whole Court, that the eldest Son should have Fee in the interim until the youngest Son came to the said age.

Pasch. 30. Eliz. in the Kings Bench.

C XXXI. Prowse and Caryes Case.

PRowse brought an Action upon the Case against Cary for words: That the Plaintiff did subborn, procure, and bring in false Witnesses in such a Court at Westminster, &c. The Defendant pleaded, Not guilty: And it was found, that he did procure and brought in false Witnesses, but was acquitted of the suborning. It was objected, That the Action doth not lie, for it may be, that the Defendant did not know that he would depose falsely: Thou art a forger of false Writings are not actionable, and so it was adjudged, for it may be understood of Letters of small importance; but that Exception was not allowed, for it shall be taken in malam partem, and cannot be spoken of any honest man.

C XXXII. Pasch. 30. Eliz. in the Kings Bench.

AWas bounden in an Obligation to B upon condition, that if A deliver to B twenty Quarters of Corn the nine and twentieth of February next following, datum presentium, that then, &c. and the next February had but eight and twenty dayes: And it was holden, that A is not bounden to deliver the Corn, until such a year as is Leap-year, for then February hath nine and twenty dayes, and at such nine and twentieth day he is to deliver the Corn, and the Obligation was holden good.

Pasch. 30. Eliz. in the Kings Bench.

C XXXIII. Allen and Palmers Case.

THe Case was, a Copy-holder did surrender his Lands to the use of a Stranger for life, and afterwards to the use of the right Heires of the Copy-holder, who afterwards surrendered his Reversion to the use of a stranger in Fee, and dyed, and the Tenant for life dyed, and the right Heir of Palmer the Copy-holder entred; And by Cook nothing remained in the Copy-holder upon the said surrender, but the Fee is reserved to his right Heires, for if he had not made any such second surrender, his Heir should be in, not by descent but by purchase. And the common difference is, where a surrender is to the use of himself for life, and afterwards to another in tail the remainder to the right Heirs of him who surrendreth, there his Heirs shall have it by descent, contrary where the surrender hath not an estate for life or in tail limited to him, for there

there his Heir shall enter as a purchasor, as if such use had been limited to the right Heires of a stranger. And by him, if a Copy-holder surrender to the use of his right Heires, the Land shall remain in the Lord until the death of the Copy-holder, for then his Heir is known, &c. See Dyer 99. The Husband made a Feofement to the use of his wife for life, and afterwards to the use of the right Heires of the body of the Husband and wife begotten, they have issue, the wife dyeth, the issue cannot enter in the life of his Father, for then he is not his Heir. See Dyer 7 Eliz. 237. The Husband is sole seised in Fee, and leuyeth a Fine of the Land to the use of himself and his wife, and the Heires of the Husband, and they render the Land to the Conqueror for the life of the Husband, the remainder to B for life, the remainder to the right Heires of the Husband: The Husband dyeth, B dyeth: Now the wife shall have the Land for the life of the wife, for she shall not loose her estate by that tender, and this remainder to the right Heires of the Husband is void, and the Land and estate in it is in him as a Reversion, and not as a Remainder. And a man cannot tail a Remainder to his right Heires whilst he is living, unlesse it begin first in himself. See Br. 32 H 8. Gard. 93.

Pasch. 30. Eliz. in the Kings Bench.

C XXXIV. Pearlē and Edwards Case.

Asumpſit. **C**onſideration **T**he Case was, that the Defendant had leased Lands to the Plaintiff ten-
yng Kent for certain yeares, and after some yeares of the Term expired
the Lessor in consideration that the Lessee had occupied the Land, and had paid
his Rent, promised the Plaintiff to ſave him harmleſſe againſt all persons, for
the occupation of the Land past, and also to come: And afterwards he di-
ſcreined the Cattel of the Plaintiff being upon the Lands, upon which he
brought his Action. Golding, here is not a ſufficient conſideration, for the
payment of the Rent is not any conſideration, for the Lessee hath the occupa-
tion of the Land for it, and hath the profits thereof; and also the conſideration
is past: Cook, the occupation, which is the conſideration, continues, there-
fore it is a good Aſſumpſit, as 4 E 3. A Gilt in Frank-marriage after the
espouſals, and yet the marriage is past, but the blood continues, ſo here; and
here the payment of the Rent is executory every year; and if the Lessee be
ſaved for his occupation, he will pay his Rent the better. Godfrey, If a man
marrieth my Daughter againſt my will, and afterwards in conſideration of
that marriage I promise him one hundred pounds, the ſame is no good conſi-
deration, which Clench Justice denied. And afterwards the Plaintiff had
Judgement to recover his damages.

Pasch. 30. Eliz. In the Kings Bench.

C XXXV. Wakefords Case.

Extinguiſh-
ment of Copy-
hold by Re-
lease. **T**he Earl of Bedford Lord of the Manors of B, ſold the Free-hold Inter-
est of a Copy-holder of Inheritance unto another, ſo as it is now no
part, but divided from the Manors, and afterwards the Copy-holder doth re-
lease to the purchasor. It was holden by the Court, that by this Release the
Copy-hold Interest is extinguished, and utterly gone; but it was holden, that
if a Copy-holder be ousted, ſo as the Lord of the Manors is disfeſed, and the
Copy-holder releaseth to the Disfeſor nihil operatur.

Pasch. 30. Eliz. in the Kings Bench.

C XXXVI. Docton and Preifts Case.

In Trespass for breaking of his Close, it was found by special verdict, that two were Tenants in common of a house, and of a close adjoining to the house, and they being in the house make partition without deed of the house and the close, see 3 E 4. 9, 10. Partition without deed upon the Land is good enough : Vide 3 H 4 1. and it seems by 3 E 4. Partition made upon the Land amounts to a Liberty : Vide 2 Eliz Dyer 179. Partition by word out of the County void, 19 H 6. 25. Betwixt Tenants in common not good without deed ; 47 E 3. 22. being upon the Land it is good without deed : Two Joyn't tenants make partition by word, make partition in another County, the same is no partition, soz as to that matter the common Law is not altered by the Statute, but as to compel such persons to make partition. Wray Justice conceived, that the partition here being without deed was not good, although made upon the Lands : Vide 18 Eliz. Dyer 35. And at another day Wray said, that partition by Tenants in common without deed wheresoever it is made is good, but in this case it appears, that the parties who made the partition were in the house (soz they were Tenants in common of the Housage and a close adjoining to it) and made partition, that one should have the house, and the other the close, so as they were not upon the close when they made the partition, and then it was void for the close, and if for the close then also for the house. And Judgement was given accordingly.

Pasch. 30. Eliz. in the Kings Bench.

C XXXVII. Cook and Songats Case.

In an Action upon the case by Cook against Songat, the Plaintiff declared, Quod cum quædam Lis, and controversy had been moved betwixt the Plaintiff Lord of the Manor, &c. and the Defendant claiming certain Lands parcell of the said Manor, to hold it by copy, and whereas both parties submitted themselves to the Judgement and Arbitrament of I S Councillor at Law, concerning the said Land, and the title of the Defendant to it : The Defendant in consideration. That the Plaintiff promised to the Defendant, that if the said I S should adjudge the said Copy to be good and sufficient for the title of the Defendant, that then he would suffer the Defendant to enjoy the said Land accordingly without molestation : The Defendant reciprocally promised the Plaintiff, that if the said I S should adjuge the said Copy not sufficient to maintain the title of the Defendant, that then he would deliver and surrender the possession of the said Land to the Plaintiff without any fee : And shewed further, that I S had awarded the said Copy utterly insufficent, &c. yet the Defendant did continue the possession of the Land, &c. And by Godfrey, here is not any consideration : But by Gawdy, the same is a good and sufficient consideration, because it is to avoid variances and suites : And Judgement was given for the Plaintiff.

Pasch.

Pasch. 30. Eliz. in the Kings Bench.

CXXXVIII. Pawlet and Lawrences Case.

George Pawlet brought an Action of Trespass against one Lawrence Parson of the Church of D. for the taking of certain carts loaded with Corn, which he claimed as a portion of Tythes in the Right of his Wife; and supposed the Trespass to be done the seven and twentieth of August, 29 Eliz. and upon Not guilty it was given in evidence on the Defendants part, that the Plaintiff delivered to him a Licence to be married, bearing date the eight and twentyeth of August, 29 Eliz. and that he married the Plaintiff and his said wife the same day, so as the Trespass was before his title to the Tythes. And it was holden by the whole Court, that that matter did abate his Will: But it was holden, that if the Trespass had been assigned to be committed one day after, that it had been good, but now it is apparent to the Court, that at the time of the Trespass assigned by himself, the Plaintiff had not tythe, and therefore the Action cannot be maintained upon that evidence, for which cause the Plaintiff was Non suit.

Mich. 30. Eliz. in the Kings Bench.

CXXXIX. Sir John Braunches Case.

Forfeiture.

In the Case of Sir John Braunch, it was said by Cook, that if a Copy-holder be dwelling in a Town long distant from the Manors, a general warning within the Manors is not sufficient, but there ought to be to the person notice of the day when the Court shall be holden, &c. For his not coming in such case cannot be called a wilful refusal: So if a man be so weak and feeble that he cannot travel without danger, so if he hath a great Office, &c. these are good causes of excuse: It was also holden, that if a Copy-holder makes default at the Court, and be there amerced, although that the amercement be not estreated, or levied, yet it is a dispensation of the forfeiture. Gawdy Justice. If the Copy-holder be impotent, the Lord may set a Fine upon him, and if he will not pay the Fine, then it is reason that he shall forfeit his Land. Egerton Sollicitor, Warning to the person of the Copy-holder is not necessary, for then, if the Lord of a Manor hath one Copy-holder of it dwelling in Cornwall, and another in York, &c. the Lord ought to send his Bayliff to give notice of the Court to them, which shoulde be very inconvenient, and by him continual default at the Court doth amount to a wilful refusal. And by the whole Court, general warning within the Parish is sufficient, for if the Tenant himself be not Resident upon his Copy-hold but elsewhere, his Farmer may send to him notice of the Court: And it was further given in evidence, that Sir John Braunch had by his Letter of Attorney appointed the Son of his Farmer his Attorney to do the services for him due for his said Copy-hold: And it was holden that such a person so appointed, might escheine Sir John, but not doe the services for him, for none can do the same but the Tenant himselfe.

Copy-holder.

Forfeiture.

Micb.

Wilkes and Per- { *Atkinson and* { *Beare and Under-* { *Jerom against Neale* 105
Jons Case. *Rolfe's Case.* *woods Case.* *and Clave.*

Mich. 30. Eliz. In the Kings Bench.

CXL. Wilkes and Persons Case.

John Wilkes and Margery his wife, and Thomas Persons brought Trespass, Trespass.
Quare clausum fregit, herbam suam messuit, & senum suum aportabit, ad
damnum ipsius Johannis, Margeriz, & Thomae; And exception was taken, that
it was not the Way of the wife, nor she was not dammified by it, but her Hus-
band: Wray Justice, the Declaration is good enough, for although it be not
good for the Way, yet clausum fregit & herbam messuit, makes it good: And
Judgement was given for the Plaintiffs.

Mich. 30. Eliz. In the common Pleas.

CXL I. Atkinson and Rolfe's Case.

In an Action upon the case by Atkinson against Rolfe, the Plaintiff decla-
red, that the Defendant in consideration of the love which he bore unto A
his Father, did promise that if the Plaintiff would procure a discharge of a
Debt of I S, which his said Father owed to the said I S, that he would save the
Plaintiff harmless against the said I S; And declared further, that he had
discharged the Father of the Defendant from the said Debt, and is become
bounden to the said I S, in an Obligation for the payment of the said Debt,
upon which Obligation the said I S hath sued the Plaintiff, and hath recover-
ed, and had execution accordingly, and so hath not been saved harmless, &c.
It was objected, that the Declaration was not good, because the Plaintiff
hath not shewed in his Declaration, that he had given notice to the Defendant
of the said Obligation, or of the suits brought against him, but that was not al-
leged, but the Declaration was holden to be good, notwithstanding the excep-
tion. Shuttleworth, if I be bounden to make to you such an assurance as I S Notice
shall devise, I am bound at my perill to procure notice: but if I be bounden
to you to make such assurance as your Councill shall advise, there notice
ought to be given unto me. It was adjourned.

Mich. 30. Eliz. In the common Pleas.

CXL II. Beare and Underwoods Case.

In a Replevin it was agreed by the whole Court, that the Plaintiff cannot
Discontinue his suit without the pivity of the Court, for as Leonard, Custos
brevium, saith, the Entry is, Recordatur per curiam; And if the Plaintiff Discontinu-
es without moving the Court, the Defendant may enter the cause of suit
continuance if he will; It was also holden, that where an Original is dis-^{in court} continued, the Defendant shall not have costs, but if the Plaintiff be nonsuite
the Defendant shall have costs by 32 H. 8. 15. Bot after a discontinuance in
a Lattice, the Defendant shall have costs by the Statute of 8. Eliz. cap 2.
And in this case it was agreed, that the Plaintiff may be nonsuite after a Dis-
continuance, and so he was.

Psch. 20. Eliz. In the Kings Bench.

CXL III. Jerom against Neale and Clave.

George Jerom, and Avice his wife brought an Action of Trespass of As^s Assault and
G^sault and wounding of the wife, and the Action was laid in Midd. and Battery.
brought against Neale and Clave, who pleaded that Salisbury is an ancient
City, and that within the same, shere is this custome, that if any make an

Affray, and assault any Officer of the said City, or any other person, if he upon whom such assault is made, complaine unto the Mayor of the said City, that the Mayor for the time being may send for him who made the Affray as a Justice of Peace, to make him to answer to it, and shewed further, that the said Jerom made an Affray within the said City, of which complaint being made to the Mayor, the said Mayor sent the Defendants being Constables to bring the said Jerom to him, by virtue whereof, they went to the House of the Plaintiff, and signified to him the commandment of the said Mayor, and would have brought the Plaintiff to him, and the Wife of the Plaintiff did assault them, and they molice put their hands upon the said Wife, which is the same assault, battery, and wounding, &c. upon which it was demurred in Law: Coke for the Plaintiff: This custome is not good, or reasonable: See Magna charta 29. Nullus liber homo capiatur, vel imprisionetur, &c. nisi per legale judicium parium suorum vel per legem terræ, therefore shall not be taken or imprisoned upon a bare suggestion, and see 24 E. 3. Br. Com. 3. where a Commission issued to take all which were suspected notoriously for Felonies and Trespasses, although they are not ended, and the same was holden against the Law, and therefore it was revoked, and see the Statute of 5 E. 4. 9. 25 E. 4. 13. 28 E. 4. 13. 28 E. 3. 3. 37 E. 3. 18. & 42 E. 3. 3. 2. To be a Justice of Peace doth not lye in Prescription. For one Justice of Peace was before the Statute of 1 E. 3. and then the Commencement being known, prescription cannot be of it, 3. Admit, that the Mayor was a Justice of Peace, yet he cannot determine any thing out of the Sessions, 4. the Prescription is, that the Mayor might send for him, and doth not say within the City, and it shall be an unreasonable Prescription to say, that the Mayor might send for him in such Case, in any place within England, 5. It is not shewed, that they of Salisbury have a corporation, so as they might be enabled to prescribe, 6. The wounding is not answered, for moliter injicere manus cannot be taken for a wounding, it may well answer the battery, &c. Fleetwood Recorder of London, if the Statute of Magna charta should be observed, no Fellow is duly handled at Newgate, and here we have not pleaded by way of Prescription, but of usage, consuetudo and usage are all one, and afterwards Judgement was given for the Plaintiffs, for the Plea in Bar was holden to be naught, because the wounding is not answered; and the Custome is too general, and also for the fourth exception.

Pasch. 30. Eliz. In the Kings Bench.

C X L I V. Sir Julius Cæsars Case.

Fleetwood came to the Bar and shewed, that Julius Cæsar Judge of the Admiralty had libelled against the Officer of the Mayor of London, Symon Nicholas, for measuring of Coales at Wiggins Key, in the Parish of Saint Dunstan in the East, and it was upon the Thames, and prayed a prohibition because such measuring of Coals had always appertained to the Mayor of London; for the Statute of 28 H. 8. 15. gave Jurisdiction to the Admiralty in case of robbery and murder: And that prohibition was grounded upon the Statutes of 13. & 15. R. 2. 2 H. 4. 11. And it was said, that this measuring whereof, &c. was in the body of the County; And note, that the said Julius Cæsar, being Judge of the Admiralty had put in this Bill, ex officio judicis, upon which it was said by Wray Justice, that it was hard that he should be both Plaintiff and Judge, and that his Jurisdiction should be tryed before himselfe, and afterwards, it was moved by Egerton Solicitor, who said he had spoken with the Lord Admirall who told him that the Mayor of London used to take a Fine for measurage, and had made an office of it, and that he conceived, the same is extortion, and being made upon the water, he conceived he is punishable in this Court, for by the same reason, the Mayor might take a Fine for the measuring of Coze, Cloathes, &c. Wray and

Gawdy Justice, if it be extortion in the Mayor, there is no remedy for it in the Court of Admiralty: But in the Kings Court, Gawdy; It shall be redressed here in a quo warranto.

Pasch. 30. Eliz. in the Kings Bench.

The Towne of Green in Sussex was amerced for the escape of a Felon, and the said Amercement was grounded upon an inquisition taken before the Coroner, by whom the escape was found, and it was moved for the Towne, that here is not any such escape found, for which the Towne ought to be amerced, for it is found, that he who escaped, 10. die Januarij, 30. Eliz. circa horam quartam post meridiem, with a Pitchfork mortally struck one A, which A of the said stroak dyed at eight in the Evening of the same day, and that then the other escaped, for which escape being made in the Night, the Towne by the Law ought not to be amerced, for it is not Felony, untill the party dyeth, which see 21 H. 4. and Coles Case, Pasch. 23. Eliz. 401. And therefore the Towne nor any other was chargeable with the offendour before that the party was dead. Wray, it shold be hard, that the Towne shold be amerced upon this matter, for although the Towne in discretion might have stayed the offendour before the death of the party, yet it is not bound so to doe: And the Court took time to advise of the Case.

Pasch. 30. Eliz. In the Kings Bench.

CXLVI. Jerom and Knights Case.

Joan Jerom brought an Action upon the Case in the nature of Conspiracy against one Knight, and declared, that the said Knight had maliciously caused the Plaintiff to be endited of Felony, and to be arraigned upon it, and that he was legitimmodo acquietat. &c. And the Case was, that the Defendant came into the Court where the Sessions was holden, and complained of the Plaintiff for the said Felony, for which the Justices there commanded her to cause an Indictment to be drawn, &c. Coke upon the Books of 27 H. 6. 12. 35 H. 6. 14. 27 H. 8. 2. Fitz. 115. It appeareth, that if one come voluntarily into the Court and discover Felonies, and it be true which he saith, or if he come in Court and draw an Indictment by the command of the Justices, or if he be bound by order of Law, to cause the party to be Indicted, or to give in Evidence although he doe it falsely, yet he shall not be punished for the same in Conspiracy, or in an Action upon the Case: But if he come gratis with malice in him before, and maliciously and falsely cause the party to be Indicted, so as falsity and malice are the ground of it, &c. it is otherwise, Gawdy Justice, how shall it be tried, if he doth it with malice or not? Coke, malice may be enquired of, for malice makes the difference betwixt Murder and Manslaughter; and in such case it is to be enquired, and here he came in to doe the same without Process or coercion in Law; But if he will falsely doe such office, his direct course is to come to a Justice of Peace, and to shew to him, that his goods are stolen, and that he doth suspect such a one, and then upon examination he shall be bound to come and give in Evidence against the party, &c. & in such case although that his Evidence be false, yet he is not punishable: At another day, it was said by Coke in the same case, ut supra, if a man be bound to give Evidence against any person, although he give false Evidence, no Action lyeth: Also if one come into Court gratis, and disclose a Felony, and gives Evidence if no malice proceed against the party, it is not punishable, and here forethought malice is alledged, and put in the Declaration, to which the Defendant hath pleaded not guilty: And now he is found guilty. See the Statute of Westminster, 2. Cap. 12. Si inveniatur per inquisitionem

Upon an Ac-
quitall of
Grace, no Con-
spiracy lieth.

quod aliquis sit abbettator per malitiam, &c. Wray Justice, it should be hard to charge one with this Action, where he hath his goods Stolen from him, and therefore causeth an Indictment to be drawn against one who he suspects of it, who shall be found guilty, who should be punished for it, for many Malefactors notwithstanding that the Evidence against them be full and pregnant, in favour of life are acquitted, whereas by Law they ought to be hanged, and it is not reason, that upon such an acquittall of grace and mercy, he should have this Action, if such person had used any words of malice before the Sessions, an Action upon the case would have layen: And afterwards Judgement was given for the Plaintiff, Trin. 27. Eliz. 730. Ratsford, and afterwards a Verdict of Errour was brought, Trin. 29. Eliz. Rot. 669. In the Originall Action the Verdict and Declaration were that the Defendant, maliciose intendens querentem in nomine, vita, fama, & bonis defraudare quendam Billam Indictamenti scribi fecit, & eam exhibuit to the grand Enquest, & ibidem false deposit omnia in ea contenta esse vera, which by Coke is full matter of conspiracy, for the drawing of an Indictment is not the office of a witness, but if it were by the commandment of the Court, or of one Justice of Peace, it should be otherwise, for there he goes by course of Justice, 21 E. 3. 17. If one conspire with another, and afterwards he procures himselfe to be one of the Indictors, his oath shall not excuse his malice before. Gaudy, if the party had taken upon him to proceed against the party upon any good presumptions, he might have pleaded it, as to say, he found the party in the house suspiciously, &c. but because he doth not plead any such matter, but generally not guilty, and the Verdict and Declaration stand not answered specially, nor controlled with the Verdict, there is no reason but that the Judgement should be affirmed; And afterwards, the Judgement was affirmed, and it was said by Wray, that here the words in the Verdict and Declaration are all one as the words in a Verdict of conspiracy, and the Defendant hath not shewed any speciall matter to enduce him to the proceedings.

Pasch. 30. Eliz. in the Kings Bench.

CXLVII. Ferrers Case.

Prescription.

Humphry Ferrers brought an Action upon the case, and declared, that he and all his Ancestors, whose heire he is, owners of the Hestnage, &c. have used time out of mind, &c. to erect Herdells, in aperta platea of Tamworth, juxta Messuagium predictum, every Market day, to make Penns there for Sheep, and that he, &c. have used for such penning of Sheep, there to take divers sums of money of such persons who would Penn their Sheep there, and further declared, that the Defendant had broken and pulled down his Herdells, per quod proficuum sum inde amisi; And upon this Declaration, Godfrey did demur in Law, r. the Plaintiff hath not shewed in his Declaration, specially where he hath used to erect his Herdells, but generally, in aperta platea, without shewing in his own Land, or in the Land of another, if in the Land of another, it is no good title, for although that those who fish in the Sea may prescribe to set Shakes on the Land adjoyning to the Sea, to hange their Nets to dry after they have done Fishing, and that is through the whole County of Kent, 8 E. 4. for their prescription is for the common Wealth, but the same is not so here, but only for a private gaine, also no prescription is good, but where some profit comes to him who prescribeth for it, which see in the case of the Abbot of Buckfast, 21 E. 4. 4. 21 H. 7. 20. Also the Declaration is, that the Plaintiff hath taken, diversas denariorum summas, and see the Prior of Dunstables case,

1 H. 6. 19. 19 R. 2. Action for le Case 51. But the certainty of the sums do not appear in this Declaration, so as the reasonablenesse of the custome might be known, also it appeareth here upon the Declaration, that Trespass, vi & armis, should lye and be brought, for the Declaration is, that the Defendant did break and pull down the Herdells which cannot be without expresse force, as 42 E. 3. 24. Trespass upon the case against a Miller, and declared that the Plaintiff used to grind at the said Mill without Toll, and that he sent his coze to the said Mill to be grinded, and there the Defendant came and took two Bushels of his said coze; And the Writ was upon the prescription to grind sine multura, and that the Defendant, predict. querent sine multura molere impedivit, and by Award of the Court the Plaintiff took nothing by his Writ, for he hath declared that the Defendant hath taken Toll, and therefore he ought to have a generall Writ of Trespass; Beaumont, to the contrary; A Market is as well for the common Wealth as a fishing: Also he is at the costs for providing of Herdells; and the erecting of them, so (as he hath declared) he hath taken diverse sums of money for it, and as to any sum not certaine, it is well enough for peradventure sometimes he hath taken a penny, sometimes two pence, as the parties could agree: And as to the exception of vi & armis, the same is not materiall, for the Plaintiff hath not lye upon the pulling down of the Herdells only, but upon the losse of the mony also, which he should have had if the Defendant had not broken his Herdells: And afterwards Judgement was given for the Plaintiff.

Pasch. 30. Eliz. In the Kings Bench.

CXL VIII. Beverly and Bawdes Case.

Beverly brought a Writ of Error to reverse an Ordinalry pronounced against him at the suit of one Bawdes, and shewed, that he was ouclained by Error, the name of John Beverly of Humby in the County of Lincoln Gent. And that within the said County, there are two Humbys, scil. Magna Humby, & parva Humby, and焉ce without addition; To which it was said, of the other side, that the truth is that there are two such Townes, and that Humby Magna is known as well by the name of Humby only, as taken for the name of Humby Magna: And upon that they are at Issue: And it was moved, if the Inquest to try this Issue shall come de corpore comitatus, or from Humby magna. And by Cook, it shall be tried by an Inquest of Humby Magna; and he confessed, that if the Issue had been, No such Towne; then the Inquest ought to be of the body of the County, but here is another Issue to be tried, 22 E 4. 4. In Trespass done in Fulborn and Hinton in the County of C. The Defendant said, that there is no such Towne nor Hamlet of Hinton within the same County. Judgment of the writ. See there by Briggs the tryal shall be, de corpore comitatus. See 14 H 6. 8. Over-dale and Nether-dale, and none without addition, and so at Issue tryed by them of the body of the County, 35 H 6. 12. And by him; wherefover an Issue may be tryed by an Inquest out of a speciall Wilson, there it shall never be tryed by the body of the County. As the case before, 22 E 4. Trespass in two Townes A and B. The Defendant as to A pleads, there was no such Towne, and as to B pleaded another plea. Now the whole Inquest shall come out of B; for the Inquest in one Towne may try any thing within the same County, which see Fitz. Visne, 27. 22 E 4. 4. And here in our case the Issue is, if Humby Magna be as well known by the name of Humby only, as by the name of Humby Magna. And therefore the same may well be tryed by Inquest out of the Towne of Humby Magna. But by Wray Justice, this Issue doth amount to no such Towne, for the perclose of the plea is, and no Humby without addition, and the book cited out of 22 E 4. is not ruled, but

is only the opinion of Brian. And afterwards it was awarded, that the trial was well: Another matter was objected, because it is not shewed in the Writ of Error, betwixt what parties the first Writ did depend, for otherwise how can the Plaintiff in the Writ of Error have a Scire facias ad audiendum Error, if none be named in the Writ of Error against whom it shall Issue. And Godfrey affirmed, that upon search of Presidents it was both wayes, so as it is at the pleasure of the Plaintiff to do it or not. And Kemp Secondary shewed divers Presidents to that purpose: And afterwards the Dut-lawyer was reversed.

Pascb. 30. Eliz. In the Common Pleas.

CXLIX. Cibell and Hills Case.

*Debt for a
Nomine penz.*

A Lease was made of a certain House and Land rendering Rent, and another sum, Nomine penz; and for the Nomine penz the Lessor brought an Action of Debt: The Lessee pleaded, that the Lessor had entered into parcel of the Land demised, upon which they were at Issue, and sound for the Plaintiff: and now the Lessor brought Debt for the Rent reserved upon the same Lease: To which the Defendant pleaded, ut supra, scil. an Entry into parcel of the Land demised: And issue was joyned upon it: And one of the Jury was challenged, and drawn, because he was one of the former Jury: And the Issue now was, whether the said Cibell the Lessor, expulit & amovit & adhuc extra tenet, the said Hills. And to prove the same, it was given in Evidence on the Defendants part, that upon the Land demised there was a Brick-kill, and thereupon a little small cottage, and that the Lessor entered, and went to the said cottage and took some of the Bricks and unfiled the said cottage: But of the other side it was said, that the Lessor had reserved to himself the Bricks and Tyles aforesaid, which in truth were there ready made at the time of the Lease made, and that he did not untile the Brick-kill house, but that it fell by tempest, and so the Plaintiff did nothing but came upon the Land to carry away his own goods: And also he had used the said Bricks and Tyles upon the reparation of the house. And as to the Extra tenet, which is parcel of the Issue, the Lessor did not continue upon the Land, but went off it, and relinquished the possession: But as to this last point, it seemed to the Court, that it is not material if the Plaintiff continued his possession there or not, for if once he doth any thing which amounts to an Entry, although that he depart presently, yet the possession is in him sufficient to suspend the Rent, and he shall be said, extra tenere, the Defendant the Lessee, untill he hath done an Act which doth amount to a Re-entry. And afterwards to prove a Re-entry, it was given in Evidence on the Plaintiffs part, that the Defendant put in his Cattel in the Field where the Brick-kill was, and that the Cattel did stray into the place where the Defendant had supposed that the Plaintiff had entered. And by Anderson Justice, the same is not any Re-entry to revive the Rent, because they were not put into the same place by the Lessee himself, but went there of their own accord. And such also was the opinion of Justice Periam.

C L. Pascb. 30. Eliz. in the Common Pleas.

Tenant in tail covenanted with his Son to stand seised to the use of himself for life, and afterwards to the use of his Son in tail, the Remainder to the right Heires of the Father: The Father levied a Fine with proclamations and dyed. It was moved by Fenner, if any estate passed to the Son by

the

the Covenant, for it is not a discontinuance, and so nothing passed but during his life, and all the estates which are to begin after his death are void. Anderson, the estate passeth until, &c. and he cited the case of one Pitts, where it was adjudged, that if Tenant in tail of an Adbowson in grosse grant the same in fee, and an Ancestor collateral releaseth with warranty and dyeth: That the same is a good Barre for ever.

Pasch. 30. Eliz. in the Common Pleas.

C L I. Staffords Case.

The case was, that the Parson of the Church of B did libel in the Ecclesiastical Court for the Lyth-milk of eight Nine depasturing within such a feild within his Parish: The Defendant said, that he and all those, &c. had used time out of mind, &c. to pay every year a certain sum of mony to the Parson, &c. for the tythes of the same feild; which plea the Judges of the Ecclesiastical Court would not allow, and therefore the party had now a Prohibition and an Injunction against the Judges, Doctors, Proctors, &c. And afterwards the same Parson libelled again for the same Tythes against the same Parishi, oner; and in both Libels there was no difference, but that in the later Libel it was for a lesse number of Nine, and now the Parishioner upon this matter prayed an Attachment upon the Prohibition, which was granted unto him by the Court, for otherwise a Prohibition should be granted to no purpose.

Attachment
upon a Prohi-
bition.

Pasch. 30. Eliz. in the Common Pleas.

C L II. Samford and Wards Case.

Samford brought a Ravidment of Ward against Ward, and counted, that Some A Ancestor of the Infant, whose Heir he is, was seised of certain Lands in fee, and held the same of the Bishop of Winchester in Socage, and dyed, his Heir within the age of fourteen years; and that the custody of the Infant did belong unto him as his prochin Amy; by force of which he seised him and has possessed, &c. The Defendant saith, that the Land was holden of him by Knights service, absque hoc, that it is holden of the Bishop of Winchester as the Plaintiff hath counted. And upon that Issue was joyned. And it was moved by Serjeant Pockering on the Plaintiffs part, that the truth of the Case was, that all the Land descended is holden in Socage, and no part in Knights service, but that part of it is holden of another in Socage: And passed the opinion of the Court, if that matter shall trench to the Issue as the same is joyned: And the Court was of opinion, that it did not: for if all be holden in Socage, it is not material if part of it be holden of another, so as it be holden in Socage.

Ravidment
of Ward.

Pasch. 30. Eliz. in the Common Pleas.

C L III. Stampe and Hutchins Case.

The Case was, the Obligor makes his Executors and dyeth; the Executors become bounden to the Obligee for the payment of the said debt, and the Obligee doth deliver back the Obligation of the Testator to them; and afterwards another Creditor of the Testator sues the Executors, who pleaded, that they have fully administered, upon which they are at issue, and the said

especial

especial matter was found by verdict. And by Shuteworth and Walmesley: The Jury have found for the Plaintiff, and that the Defendants have not fully administered: And yet they agreed the case of 20 H 7. 2. The Executors paying to the Creditors of the Testator a Debt with their own goods, they may retain so much of the goods of the Testator; but that case is not like to this, for here the Executors have not made any payment or satisfaction of the Debt, nor disbursed any money, &c. nor other things, but only have made an Obligation, to pay a sum of money at a day to come, before which day it may happen that the Obligation be cancelled or released; but it may more fitly be compared to the case 27 H 8. 6. where an Executor had compounded with a Creditor of the Testator for the payment of twenty pounds for a debt of forty pounds, and had an Acquittance testifying the payment of the forty pounds, where it was holden, that the other twenty pounds is Assets. And by Rhodes,

Administrati-
on.
Assets.

Retainer by
administra-
tors.

this making of an Obligation by Executors, (although the Obligation, in which the Testator was bounden, be delivered to the Executors and cancelled) is not any administration nor payment of the said debt due: So if the Executors pledge the goods for the payment of such a debt, yet they shall be accounted Assets until payment be made, which Periam denied. And Periam and all the other Justices held clearly, that if in such case the Executors make a sufficient Obligation to the Creditor of the Testator, and sufficiently discharge the Testator without fraud or covin, that they may retain the goods of the Testator for so much: and the goods retained shall not be said Assets: And this case is all one with the case 20 H 7. for here they have discharged the Testator, and the Executors do remain charged with the same to the Creditor, and it is so fully administered, as if the Executors had expressly paid the debt. And it is not like to the case of 27 H 8. cited before, for there, although they have discharged the Testator, yet they have not charged themselves, otherwise it is in the principal case; and although they have appointed, *interiorum diem*, for the payment of the said debt, yet the same is not material: But the Lord Anderson conceived, that if the Creditor doth deliver unto the Executors the Obligation as an Acquittance or discharge, and in consideration thereof they promise to pay the debt, the same is not any administration as to the said debt. And by some of the Serjeants, If the plea stands good to prove fully administered, then Executors in such case may make an Obligation to pay the debt forty years after, and so defraud the other Creditors, which is not reasonable: If a Fecomt in Fee be made upon condition to pay certain money at such a day, and at the day the Fecomee makes an Obligation to the Fector for the payment of it, the same is no performance of the condition. And by Periam, If the Executor be taken in Execution for the debt of the Testator, he may retain so much of the goods of the Testator amounting to the sum for which he is in Execution, & it shall not be accounted Assets in his hands. Anderson, If he to whom the Testator was indebted in twenty pounds, be indebted to the Executors in so much, and the Executors in satisfaction of the debt of the Testator, releaseth his debt, the property shall be altered presently of the whole goods in the hands of the Executors, so where the Debtor makes the Creditor his Executor. And Judgment was given for the Executors.

Pusl. 30 Eliz. in the common Pleas.

C L I V. Beares Case.

Fornedor.

A Formedon in the Discender was brought by Samuel Beare, James Beare, and John Beare of Lands in Gavel-kind; and the Warrant of their Ancestors was pleaded against them in Barre, upon which they were at Issue.

31

If Assets by descent. And it was found by special verdict, that Thomas, Father of the Demandants, was seised in Fee of the Lands supposed to be descended to the Demandants, being of the nature of Gavel-kind, and devised the same to the Demandants, being his Heires, by the custom, and to their Heires equally to be divided amongst them: And if the Demandants shall be accounted to be in of the Lands by descent, or devise, was the question, for if by devise, then they shall not be Assets: Anderson, Let us consider the devise by it self without the words (equally to be divided amongst them.) And I conceive, that they shall be in by the devise, for they are now Joint-tenants, and the survivor shall have the whole, whereas if the Lands shall be holden in Law to have descended, they should be Parceners, and so as it were Tenants in common. And although the words subsequents equally amongst them to be divided makes them Tenants in common, yet that doth not amend the matter; and so also was the opinion of Windham and Rhodes Justices.

Pascb. 30. Eliz. in the Kings Bench.

CL V. Nash and Edwards Case.

In an Ejectione firmæ by Nash against Edwards, it was found by special verdict, that one Dover Ancesto^r of the Plaintiff, whose Heir he is, being seised of certain Lands holden in Socage, devised the same by word to his three sisters; And a stranger being present recited to the Devisor the said words of his Will, and he did affirm them. And afterwards the said stranger put the said words in writing for his own remembrance, but did not read them to the Devisor, who afterwards dyed. And it was moved, If this devise being reduced in writing, modo & forma, be good or not. Spurling conceived that not, for the Statute intends a Will in writing, but not such writing as is here without privity or direction of the Devisor, and it is not like to the case of Brown and Sackvill, 5 Ma. Dyer 37. For the Notes were written by the commandment of the Devisor, but here it doth not appear that the meaning of the Devisor was, that the devise should be put in writing: And devises in Law are favoured, as the case in the Chancery was, that Sir Richard Pexhall devised certain Lands to his wife, and the Scrivener inserted of his own head a condition, scil. (that she should be chaste) which was disallowed by the Devisor himself, for which after his death the condition, although it was put in writing, was void. And by the whole Court the devise is void. And by Wray, if he apponit A to write his Will, and it is written by B, it is void; but if after he had written the Will if he had read it to the Devisor, and he had confirmed it, it had been a good Will, which Gawdy granted: And afterwards Judgement was given, that the Plaintiff should recover.

Trin. 30. Eliz. Rot. 771. In the Kings Bench.

Stone and Withypolls Case.

Stone brought an Action upon the Case against Dorothy Withypoll the Executrix of W. Withypoll her Husband, and declared that where her said Husband for certaine yeards of Velvet of the value of fourteen yards, & diversis alijs mercimonijis, was endebted to the Plaintiff in the sum of ninety two pounds, and made the Defendant his Executrix and dyed, that after his death he came to the Defendant, and demanded of her the said debt, who gave to him such answer, so bear me untill Michaelmas, and then I will pay it you,

Asumpt.

or put you in sufficient security for the true payment thereof: And declared further, that at Michaelmas aforesaid, the Defendant did not pay, nor hath found any security, and shewed a request, to which the Defendant said, that the said Testator, at the time of the said Contracts for the Velvets and other Wares, was within age: And upon that Bar the Plaintiff did demur in Law. Egerton Solicitor for the Plaintiff, as I conceive these Contracts made by the Plaintiff are not merely void, so that is an Action of Debt, or upon the Case, had been brought against the Testator himself, he could not have pleaded upon the matter *Nihil debet, n*on* Assump*tio*, or, Non est factum*, but he ought to avoid the matter by special pleading, and therefore here it is a good consideration, & I conceive that if the Testator at his full age had assumed to pay the debt, that that promise would have bound him, q*uod* Eliz. it was the Case of the Lord Grey, his Father was indebted to diverse Merchants upon simple Contracts, and dyed certain of diverse Lands which descended to his Son and Heire in Fee, the Creditors demanded their debts of the Heir, who answered unto them, if my Father were indebted unto you, I will pay it, and upon that promise an Action was adjudged maintainable, although the Heir by the Law was not chargeable, and also here the Defendant is to have ease, and shall avoid trouble of Suits, for perhaps if shee had not made such promise, the Plaintiff would have sued her presently, which shold be a great trouble unto her, and therefore it is a good consideration. Cooke contrary no consideration can be good, if not, that it touch either the charge of the Plaintiff, or the benefit of the Defendant, and none of them is in our case, for the Plaintiff is not at any charge, so which the Defendant can have any benefit, for it is but the forbearance of the payment of the debt which shee was compellable to pay, and as to the suit of the Chancery, the same cannot make any good consideration, for there is not any matter in the Case, which gives cause of suit in Chancery, for they will not order a matter there which is directly against a Rule and Practice of the common Law. As if a Feme Covert be bound, &c. and the Obligee bring her into the Chancery, and if a man threaten me, that if I will not pay to him ten pounds, he will sue me in the Chancery, upon which I promise to pay it him, no Action will lye: And an Infant is not chargeable upon any contract, but for his meat, drinke, and necessary Apparell, 19 E. 4. 2. And in Debt upon such necessary Contract, the Plaintiff ought to declare specially, so as the whole certainty may appear upon which the Court may judge, if the expence were necessary and convenient or not, and upon the reasonableness of the price, for otherwise, if the necessity of the thing, and reasonableness of the price doth not appear, the Chancellor himselfe would not give any remedy, or recompence to the party, Wray Justice conceived, that the Action would not lye, for the contract was void, and the Infant in an Action against him upon it may plead, *Nihil debet*: And if an Infant sell goods for money and doth not deliver them, but the Vender takes them, he is a Trespassor, but if the Infant had been bounden in an Obligation with a surety, and afterwards at his full age he in consideration thereof promiseth to keep his surety harmlesse, but upon that promise an Action lyeth, for the Infant cannot plead non est factum, which see Mich. 28. and 29. Eliz. in the Case of one Edmunds: And afterwards it was adjudged against the Plaintiff.

*Trin. 30. Eliz. Rot. 8*ij*. In the Kings Bench.*

C L V I I . Charnock and Worsley's Case.

Charnock and his Wife brought a writ of Error against Worsley, the Case was that the Husband and Wife, the Wife being within age levied a fine, and the Wife upon inspection was adjudged within age, and it was

moved

moved, if the Fine should be utterly reversed, or as to the Wife only, and should stand against the Husband, and by Godfrey the Book of 50 E. 3. 6. was vouch'd where it is said by Chandish, that where such a Fine is reversed, the Plaintiff shall not have execution till after the death of the Husband; and by Coke and Atkinson, a Fine acknowledged by the Husband and Wife, is not like to a Finesment made by them, for in case of Finesment something passeth from the Husband, but in case of a Fine all passeth out of the Wife, and the Conshee is in by her only, and Atkinson shewed a President in 2 H. 4. where the Fine was reversed for the whole, and also another President, P. b. H. 8. Rot. 26. A Fine levied betwixt Richard Elie Plaintiff, and N. Ford, and Jane his Wife Diforceants, the Wife being within age, and Judgment was given, quod finis predict. adulteretur, & pro nullo penitus habeatur, and that the Husband and wife should be restored, and thereupon a Writ issued to the Custos Brevium, to bring into Court the Foot of the Fine, and it was presently cancelled in Court, Wray, this is a strong precedent, and we will not barre from it, if other Presidents are not contrary. Gawdy (who was the same day made Justice) the Fine cannot be reversed as to one, and stand as to the other, and resembled it to the Case of Littleton 150. where Land is given to Husband and Wife in taile before coverture, and the Husband aliens, and takes back an estate to him and his Wife for their lives, they both are remitted, for the Wife cannot be remitted if the Husband be not remitted: And a President was cited to the contrary, 7. Eliz. where the Case was that the Husband and Wife levied a Fine, the Husband dyed, the Wife being within age the Wife took another Husband, and they brought a Writ of Error, and the Wife by inspection adjudged within age, and the Fine was reversed as to the Wife and her Heirs: And it was argued by Golding, that here the Writ of Error ought to abate, for the Writ is too general, whereas it ought to be speciall, Ex querela A.B. nobis humillime supplicantis accepimus, &c. See the Book of Entries 278. Also the purclse of the Writ is ad damnum ipsorum, the Husband and the Wife, whereas the Wife only hath lost by it, and as to the Fine it selfe, he conceiv'd, that it should be reversed but as to the Wife, as if a man of full age, and a man within age, levy a Fine, in a Writ of Error brought, the Fine shall be reversed, as to the Infant only, and shall stand against the other, and he cited the Case of the Lord Mountjoy, 14. Eliz. Where a man seised in the right of his Wife acknowledged a Statute, and afterwards he and his Wife levied a Fine, and he said that during the life of the Husband, the Conshee of the Fine should hold the Land charged with the Statute: Also in the President of 2 H. 4. the Judgement is, that proper hunc & alios errores, the Fine should be reversed, and I conceive that another Error was in the said Writ, for which the Fine might be reversed in all, viz. the Fine was levied of two parts of the Mannor of D. without saying in tres partes dividend. And see that where two parts are demanded in a Writ, the Writ shall say so, Breif 244. Coke contrary, and as to the last matter I confess the Law is so in a Writ, but not in a Fine, for the same is but a Conveyance, for if I be seised of a Mannor, and I grant to you two parts of the said Mannor, it is clear, it shall be intended in three parts to be divided, And as to the principall matter I conceive, when the Fine is levied by the Husband and Wife, it shall be intended that the Land whereof, &c. is the Inheritance of the Wife, if the contrary be not shewed, and therefore if the party will have an especial Reversall, he ought to shew the special matter, as in Englishes Case: A Fine was levied by Tenant for life, and he in the reversion being within age, bringeth a Writ of Error, now the Fine shall be reversed as to him in the Reversion, but not as to the Tenant for life, but here it shall be intended the Inheritance of the Wife, and that the Husband hath nothing but in the right of his Wife, and therefore she shall be restored to the whole, for nothing passeth from the Husband, but he is named with his

Wife only for conformity, 11 H. 7. 19. A takes to Wife an Inheretrix, who is attainted of Felony, the King shall have the Land presently, by which it appeareth that all is in the Wife, and shee shall be restored to the whole, and the Judgement shall be according to the two Presidents cited before: And as the President cited 7. Eliz. the same is not to the purpose, for the former Husband was a strenger to the Fine, for which it should be absurd to reverse the Fine as against him: Egerton Solicitor Generall; Presidents are not so holy, quod violari non debeant, as to be rules to other Judges, in perpetuum, and I conceive that the Fine shall be reversed as to the Wife only, for the Fine is but a Conveyance, and the Husband may lawfully convey the Land of his Wife for his life, and if the Husband alone had levied the Fine, the same had bounden the Wife during his life, if a woman Lessee for life taketh to Husband him in the Reservation, and they joyne in a Fine, the Wife then being within age, now in a writ of Error brought thereof, the Fine shall stand as to the Inheritance of the Husband, but shall be reversed as to the Interest of the Wife. Coke, it shall be intended here, all the Interest and estate in the Land to be in the Wife, as 10 H. 7. 1. Where the Husband and Wife are bouched, it shall be intended by reason of the Warranty of the Wife only, and so the Counter-plea shall be of the seisin of the Wife and her Ancestors: Wray, when the Husband and Wife joyne in the Fine, it shall be presumed, the Inheritance of the Wife, and if it be otherwise, it ought to be specially shewed, and as to that which hath been said, that if the Husband alone had levied a Fine, it should have bounden the Wife during the life of the Husband, the same is true, but such Fine is but a discontinuance, but the right continued in the Wife, but when the Husband and Wife joyne in the Fine, all passeth out of her, and if the Fine in such case for the Inheritance shall be recovered in all, to whom belongs the free-hold, and to whom shall be attendant. Gawdy, 12 H. 7. 1. In a Preceipe quod reddit against these, they bouch feitorally, the Troucher was not received, and yet they might have severall Causes of Troucher, but the Law presumes they are Joyn-tennants, and have a joyn't cause of Troucher, if the contrary be not shewed: And afterwards Indgement was given, quod finis predict. reversetur, and Wray said had conformed with many of the other Justices, who were of the same opinion. Gawdy, the Fine shall be reversed in all, for this is an Error in Law of the Court, F. B. 21. D. Soz by this Fine the Husband giveth nothing divided from the estate of the Wife, but all passeth from the Wife, and therfore all shall be reversed, and if the Fine should be reversed as to the Wife only, then the Fine levied now by the Husband alone is a discontinuance, by which the Wife by the common Law shall be put to her Cui in vita, and that is not reason, also we cannot by this Reversall, make the Conusee to have a particular estate during the life of the Wife: And therfore the Fine is to be reversed for the whole, and as void for the whole to the Conusee.

Trin. 30. Eliz. in the Kings Bench.

CL VIII. Cage and Paxlins Case.

Daniel Cage brought an Action of Trespass against Thomas Paxlin for trespass done in a Close of Wood, called the Fritch-Close, and in the Parke, and for taking of certain Loads of Wood: The Defendant pleads, that the Earle of Oxford was seised of the Mannor of W. of which the place where, &c. is partell, and leased the same to J S for yeares, excepting all Woods, great Trees, Limber-trees, and Tinder-woods, &c. And covenanted

ted with the Lessee and his Assignes, that he might take Heng-boot, and Fire-boot, super dicta premissa, and he wrot further, that the said 15 assigned his Interest unto the Defendant, and that he came to the said Close called the Frith-Close, and cut the Wood there for Fire-boot, as it was lawfull for him to doe, &c. And note, that after the Lease aforesaid, the said Earle had also Lands excepted the Inheritance thereof to Cage the Plaintiff. And it was argued by Godfrey, that the Lessee cannot take Fire-boot in the said Close, for the wood &c. is excepted, and was never demised, and by the exception of the wood, the soile thereof is excepted : See 46 E. 3. 22. A leased for life certain Lands reserving the great wood, by that the soile also is reserved, vi. 33 H. 8. to Reservation, 39. 28 H. 8. 13. And by the words of the Covenant, the intent of the Lessor appeareth, that the Lessee shall have his Fire-boot out of the residue of the Lands demised, for pramissa here is equivalent with premissa : And he cited the Case moved by Mountaine cheif Justice, 4. E. 6. in Plowden, in the Case betwixt D'ye and Manningham, 66. A. leaseth unto B. a Mannor for yeares, excepting a Close, parcell of it, rendzing a Ment, and the Lessee is bounden to performe all Grants, Covenants, and Agreements, contenta & expressa aut recticata, in the Indenture, if the Lessee will turbe the Lessor, upon his occupation of the Close excepted, he hath forfeited his Obligation, &c. But our Case is not like to that : And if I let the Mannor of D. for years, except Green-meadow, and afterwards I covenant that the Lessee shall enjoy the Premises, the same both not extend to Green-meadow. Snagg Verjeant to the contrary, and by him premissa, are not restrained to premissa, but to all the Premises put in the former part of the Indenture of Demise, therefore the Lessee shall have Fire-boot in the one, and the other, and he put a difference between all Woods excepted, and all Woods growing excepted, for in the one case the soile passeth, in the other not : And as to the Case cited before in Plowden, 66. that's true, for exception is an Agreement : And he said that by that exception the soile it selfe is excepted, and those Woods which are named by name of Woods, contrary where a Close containeth part in Woods, and part in Pasture ; And by the exception of Timber-trees, and Under-Woods, all the other Woods are excepted, but not the soile : As if a man grant all his Lands in D. Land, Meadow, Pasture, and Woods thereby passeth, by exception of this Close of wood, the soile also is excepted, and he conceved, that altho' though all the Woods be excepted, yet by the Covenant an Interest passeth to the Lessee, so as he may take Fire-boot without being put to his Action of Covenant : As 21 H. 7. 30. A. leaseth unto B. for life, and Covenants in the Indenture of lease, that he shall be dis punished of all ass, although the same be penned by way of Covenant, yet it is a good matter of War being all by one Deed : And afterwards Judgement was given for the Plaintiff, as to that Close of wood called Frith-Close; but as to the Parke, for the Defendant, for the Frith-Close was all excepted, scil. the wood and the soile : And these Woods, super premissa, shall be intended such things which were demised, and no other, and by this Covenant, the Lessee hath power to take the wood upon the other Lands, although that the wood be excepted, for the soile was demised, and he shall not be punished in Trespaule, and put to his remedy, by Action of Covenant against the Lessor : And by Wray, there is not any colour against the Plaintiff for the Frith Close, if not that the Defendant had averred, that there is not any wood upon the other Lands not excepted but demised ; And this word, Pramissa, doth not extend by construction to this mentioned before, being excepted, but only to the things demised.

Trin. 30. Eliz. In the Kings Bench.

C L I X. Rivett and Rivetts Case.

Assumpsit.

Edmund Rivett brought an Action upon the Case against George Rivett; and declared, that where it was pretended to the Defendant, that one R made his Will, and by the same devised certain Legacies to the Defendant, and the Plaintiff upon that had sued in the Prerogative Court of Canterbury for to disprove the said Will: And if he prosecutus fuisset, he might have disproved the said Will, and so defeated the Defendant of his pretended Legacies: The Defendant in consideration that the Plaintiff, ultra non procedere, did promise to give to the Plaintiff one hundred pounds: and averred, that he had surceased his said suit: And further declared, that licet the Defendant ad hoc requisitus fuerit tali die & anno, &c. It was moved in arrest of Judgement, that here is not any consideration, for the Defendant hath not any meanes to compell the Plaintiff, for to surcease his suit, for there is not any crosse promise set forth in the Declaration: And although that he doth surcease his suit, yet he may begin the same again, and therefore the Plaintiff ought to have shewed in his Declaration a Release or other discharge of it, as the case was 3 Eliz. reported by Bendloc. A was bound unto B in twenty pounds, and afterwards A promised to B, that in consideration the said A should not be dammified by reason of the said Bond, to give the said B ten pounds, and upon that promise B brought an Action upon the Case, and shewed, that the Defendant was not dammified by reason of the said Bond. But it was adjudged, that the Action was not maintainable upon that matter, because that the Plaintiff did not shew in his Declaration, that he had released or otherwise discharged the Defendant of the said Bond, and so no consideration in the case.

Request.

Another Exception was, because the request is not layed certainly, but generally, licet requisitus, and doth not say by whom he was required, or what thing to do: And afterwards a President was shewed, Trinit. 28. Eliz. rot. 523. betwixt Smith and Smith. An Assumpsit, in consideration that the Plaintiff should not implead the Defendant upon Bond: And the Plaintiff had Judgement to recover. And as to the request it was laid by Kempe, that there are many Presidents, that a Request generally levied is sufficient: And afterwards in the principal Case Judgement was given for the Plaintiff.

Trin. 30. Eliz. In the Kings Bench.

C X L. Wheeler and Twogoods Case.

Wheeler brought an Ejectione firmæ against Twogood, and it was found by special verdict, that the Earl of Oxford was seised of the Mannor of Hornely, in which were divers Copy-holds: And that the said Earl leased the said Mannor to one Heywood for one and twenty yeares, to begin two yeares after. Except all casualties and profits of Courts, which severally did not passe the value of six Shillings eight pence. And afterwards the Earl bargained and sold the Reversion to Anthony Cage: And afterwards a composition was made betwixt Anthony Cage and the Lessee, by which the Lessee did grant and covenant to & with the said A Cage, that he would permit the said Anthony Cage peaceably to hold the Courts and to take the profits to his own use, Proviso, that the said Lessee should have the Rents of the Copy-holders and free-holders: And afterwards the Lessee granted over his Interest in the said

said Term. It was moved by Towse, that by this Exception the Court Baron is not excepted nor severed from the Manors, nor destroyed, for it is incident to the Manors, and this Covenant between the Lessor and Anthony Cage amounts to a grant of the Court to Anthony Cage. See 44 E 3. Fitz. Man. tit. de factis 144. and 29 E 3. Burr. 280. and see 37 H 8. and 1 E 6. Br. Leases 60. That where I S Covenants, & concessit to I N, that he shall have twenty acres of Land in B for one and twenty yeares, it is a good Lease, for this word concessit is as strong as dimitit. And it was moved, that here the Earl leased for yeares to begin two years after, and the Lessee being in possession, both continue it after the two years, and afterwards before any entry the Lessee allinges over his Interest, that the same is not a good grant, but only a Right: But by the whole Court the grant was holden good, notwithstanding the said Exception: And it was holden also, that the Covenant (as supra) was void, for although that Anthony Cage hath authority to hold the Courts, yet it ought to be in the name of the Lessee.

Covenant
amounts to a
grant.

Trin. 30. Eliz. in the Kings Bench.

CL XI. Stretton and Taylors Case.

Stretton did informe against Taylor upon the Statute of Ulry: Qui se-
quuntur tam pro Domina Regina, quam pro seipso: And the Queens Attorney entered upon it, &c. non vult prosecuti, and that was pleaded in Bar against the Informer for the whole: And by Wray, the same is not any Barre to the Attorney, But Popham the Attorney general said, that by the favour of the Court he would maintain the authority of his place, which his Predecessors had enjoyed, so he said, it cannot be sound by any Recop in this Court, Common Pleas, or the Exchequer, that the Informer had proceeded where the Attorney General had made such an Entry, for we have not used to do it without great consideration, for if the Informer hath ceased to prosecute the Sute two or three Termes, then we used to enter a Non vult prosecuti. For it is not reason that the Subject should be molested or attainted so long without just cause, and it is not against Law, that in personal Sutes the act of one should prejudice the other: And the Queen is the principal party in this sute, for the Replication shall be made in the name of the Queen only, and not of the Informer: And afterwards by Award of the Court it was ruled, that that Entry by the Attorney is not any Barre, quod the Informer, so if the Queen be Nonsuit, so the Nonsuit of the Informer is no Barre against the Queen: And Wray said, that such was the opinions of Anderson and Gaudy Justices, &c.

Information
upon the Sta-
tute of Ulry.
Retraint by the
Queens Atto-
ney shall not
bind the Infor-
mer.

Trin. 30. Eliz. in the Kings Bench. Intrat. Hil. 30. Eliz.

Rot. 10.

CL XII. The Queen against Lewis, Green, and others.

An Information for the Queen against Lewis, Green, and others: The Case was, King E 6. was seised of the Manors of Stepneth, and twenty acres of Land in Stepneth, called Stepneth Marsh, and of another Marsh also called Stepneth Marsh, and granted unto the Lord Wentworth and his Heires the Manors of Stepneth, in the County of Midd. Nec non manescam in Stepneth, appelle. Stepneth Marsh in com. predict. nec non omnia terr. & ten. eidem Manerio sive premissis pertinent. And if the twenty acres, called Stepneth Marsh, not parcel of the said Manors passe, as not, was the Question: Cook,

Grants of the
King.

that

The Queen against Lewis,
Green, and others.

that they shall passe : Here this grant doth consist of three parts ; 1. The grant of the Manoz ; 2. Nec non mariscum in Stepneth ; 3. Nec non omnia, terras & tenements dicto Manerio sive premissis pertinen. And by the second clause these twenty acres shall passe, be the same parcel or not, and the latter words cannot referre to that, for it is certainly expressed before. And the case latsly agreed in the Court of Wards betwixt Bronkor and Robotham was cited, which was, That the King being seised of the Manoz of Sandridge and Newnam, parcel of the possessions of the Monastery of Saint Albans, and part of the Manoz of Newnam extended into the Parish of Sandridge, and the King granted the Manoz of Sandridge, nec non omnia, terras & tenements sua in Sandridge, dicto nuper Monasterio pertinen. nec non omnia, terras & tenements sua dicto Manerio de Sandridge pertinen. By which grant, although that the latter clause doth restrain it to the Manoz of Sandridge, yet the general words of the second clause shall extend to make passe all the whole Manoz of Newnam, which extended into the Parish of Sandridge, and a Decree was in the said Court accordingly.

At another day the case was argued, and the case put to be thus. King E 6. was seised of the Manoz of Hackney and Stepneth in the County of Midd. within which was a great Marsh, called Stepneth Marsh, parcel of the Manoz of Stepneth, which the King had by exchange of the Bishop of London, and there were also twenty acres of Lands which were lying in Stepneth Marsh, and were known by the name of Stepney Marsh, late parcel of the possessions of the Prior of Grace, and granted unto the Lord Wentworth and his Heirs, Dominia sive Maneria sua de Hackney & Stepney, nec non mariscos suos de Stepney in Stepney praedict. nec non omnia Maneria terras & tenem. & mariscos dictis Maneris aut ceteris premissis pertinen. If these twenty acres passe in the general words in the first Nec non, or if the words in the second Nec non (dictis Maneris pertinen.) doth restraine the generality of the first words, was the question : And by Phillips the twenty acres doe not passe, for the grant of the King shall be alwayes taken to a common intent : And because here the King hath these Marshes by several titles, that Marsh only shall passe, which by general ententment shall be intended to passe, scil. the great Marsh, which was in truth parcel of the Manoz of Stepney, and not the twenty acres which the King hath by a special title, although that, ex vi termini, the grant may extend unto it : Also the grant of the King shall be taken, secundum intentionem Regis, and not in deceptionem ; and here it appeareth, that the intent of the King was not, that these twenty acres should passe, i. the King grants Maneria sua & terras, and all Lands, &c. iisdem pertinen. but it is not part of anything pertinen. to those twenty acres, therefore his intent was not to passe them. Secondly, the grant is to have them as fully as the Bishop of London had them, without mentioning of the Prior. Thirdly, as fully as the Bishop had granted them to us, but the Bishop had not granted these twenty acres to to the King. Fourthly, in the Letters Pattents the King recites the value of the Manoz of Hackney and Stepney, but no value of the twenty acres, (Quare, what difference there is betwixt Stepney Marsh, & the Marsh of Stepney.) As to the first, the grant is, iisdem & ita premissis pertinen. which word premissis includes the premisses or otherwise should be void : Secondly, the words as the Bishop had, and as amplie as we have from the Bishop are surplusage, and nihil operatur by them. And if the King had not the same of the Bishop it is not material, but they shall passe notwithstanding, because by a special name : As if the King grants to me Manerium de Dale, quod a nobis nuper concebat fuit, and in truth it was not concealed, yet it shall passe by his special name : But if the grant had been; Proviso, that if the said Manoz were concealed, &c. the same had been good, for it is good by way of Proviso, but not by reference. As to the valuation the same is not material, for who can restraine the bounty of the King. 29 E 3. 7, and 8. The King granted omnes Advocaciones pertinentes,

Grants of the
King taken
according to
his intent.

pertinend to such a Priory, quas nuper concessimus patri, of the Patentee, although the King had not ever made such a grant, yet it is a good grant to the Sons, causa qua supra. Gaudy Justice conceived, that the twenty acres did passe, and he confessed the case betwixt Bronkor and Robotham to be good Law, for there the intention is fully, that all appertaining to the Monastery, whether it were parcel of the Mannor of Newnam or of Sandridge, passeth, 6 E 6. 8. Dyer. A man leaseth all his Meadows in A containing ten acres, whereas in truth they are twenty acres, all passeth, &c. And if the King grant the Mannor of D to A; and further saith, Damus & concedimus, so freely as I S had it, and I S never had it, yet the grant is good: And as to the miscre-
tal of the value, the same is helped by the Statute. Clench Justice to the same intent, and the Jury hath found, that the twenty acres are parcel of Stepney Marsh. Wray to the same intent, against expresse words no fauour shall be given to the King. And note, that the Parishes pertaining to the Mannor are in the third clause, ergo, the Marsh in the second clause shall be in-
tended a Marsh in grotte, or otherwise it shoulde be idle. And afterwards Judgement was given against the Queen.

Trin. 30. Eiz. In the Kings Bench.

CL XIII. Piers and Leversuchs Case In Ejectione
firme.

It was found by special verdict, that one Robert Leversuch Grand-father of the Defendant, was Tenant in tail of certain Lands, whereof, &c. and made a Lease for yeares to one Pur. who assigned it over to P father of the Plaintiff. Robert Leversuch died: W his Son and Heir entred upon P, who re-entered. W demised without other words the Land to the said P for life, the remainder to Joan his wife for life, the remainder to the Son of P for life with warranty, and made a Letter of Attorney therein to enter and deliver seisin accordingly. P dyed before that the Liberty was executed, and afterwards the Attorney made livery to Joan. W dyed; Ed. his Son and Heir entred upon the wife, she re-entered, and leased to the Plaintiff, who upon an ouster brought the Action. Heale. When P entred upon W Leversuch the issue in tail, he was a disseisor, and by his death the Land descending to his Heir, the entry of W Leversuch, the issue in tail, was taken away: Cook con-
trary. P by his entry was not a disseisor, but at the Election of W, for when P accepted such a deed from W, it appeareth that his intent was not to enter as a disseisor; and it is not found that the said P had any Son and Heir at the time of his death, and if not, then no dissent; and there is not any disseisin found that P. expulit Leversuch out of the Land. And Judgement was given a-
gainst the Plaintiff. And Cook cited a Case which was adjudged in the Common Pleas, and it was the Case of Shipwith, Grand-father, Tenant in tail, Father and Son; The Grand-father dyed, the Father entred and paid the Rent to the Lessor, and dyed in possession, and adjudged, that it was not any dissent, for the paying of the Rent doth explain by what title he entred, and so he shall not be a Disseisor but at the Election of another.

Trin. 30 Eliz. in the Kings Bench.

CL XI V. Severn and Clerkes Case.

Agreements. The Case was, that A by his Deed Poll recited, That (whereas he was) possessed of certain Lands for years of a certain Term. By good and lawful conveyance he alienated the same to I S, with divers Covenants, Articles and Agreements in the said deed contained, which are or ought to be performed on his part. It was moved, if this recital (whereas he was) be an Article or Agreement within the meaning of the condition of the said Obligation, which was given to perform, &c. Gaudy conceived, that it is an agreement: For in such case I agree, that I am possessed of it, for every thing contained in the deed is an Agreement, and not only that which I am bound to perform: As if I recite by my deed, that I am possessed of such an interest in certain Land, and assign it over by the same deed, and thereby covenant to perform all Agreements in the deed, if I be not possessed of such Interest, the covenant is broken. And it was moved, if that recital be within these words of the condition (which are or ought to be performed on my part.) And some were of opinion, that it is not within those words; for that extends only in futurum, but this recital is of a thing past, or at the least present.

Recital. Clench. Recital of it self is nothing, but being joined and considered with the rest of the deed it is material, as here, for against this recital he cannot say that he hath not any thing in the Term. And at the length, it was clearly resolved, that if the party had not that Interest by a good and lawful conveyance the Obligation was forfeited.

Trin. 30 Eliz. in the Kings Bench.

CL XVI. Page and Jourdens Case.

Trespass. In the Trespass betwixt Page and Jourden the case was: A Woman Tenant in tail took a Husband, who made a Feofment in fee and died. The Wife without any Entry made a Lease for years: It was moved, that the making of this Lease is an Entry in Law. As if A make a Lease for years of the Land of B, who enters by force of that Lease, now the Lessor without any Entry is a Disseisor. And it was resolved, that by that Lease, that the Feehold is not reduced without an Entry.

Trin. 30 Eliz. in the Kings Bench.

CL X VI I. Havithlome and Harvies Case.

Upon Statute of cap. 9. Havitlome brought an Action upon the Statute of 5 Eliz. cap. 9. against Harvie and his Wife for the penalty of ten pounds given by the said Statute against him who was served with process, ad testificandum, &c. and both not appear, not having any impediment, &c. and shewed that process was served upon the Defendants Wife, and sufficient charges, having regard to her degree and the distance of the place, &c. tended to her, and yet she did not appear. And it was found for the Plaintiff. It was moved in arrest of Judgement, that the Declaration is not good, because the Plaintiff in setting forth that he was damaged for the non appearance of the Wife according to the process, hath not shewed how dammified: Also it was moved, that a Feme Covert

Covert is not within the said Statute, for no mention is made of a Feme Covert, and therefore upon the Statute of West, 2 cap. 25. If a Feme Covert fail of her Retour, she shall not be holden disseisnesse, nor impunished. Also here the Declaration is, that the Plaintiff tendered the charges to the Wife, where he ought to have tendered the same to the Husband.

To these three Exceptions it was answered. 1. That although the party be not at all dammned, yet the penalty is forfeited. 2. Feme Covorts are within the said Statute, otherwise it should be a great mischeif, for it might be that she might be the only witness: And Feme Covorts, if they had not been expelly excepted, had been within the Statute of 4 H 7. of Fines. 3. The wife ought to appear, therefore the tender ought to be to her: And afterwards Judgement was given for the Plaintiff.

Pasch. 30. Eliz. in the Kings Bench.

C L X V I I. Dellaby and Hassalls C/s/e.

In an Action upon the Case, the Plaintiff declared that the Defendant in Consideration that he had retained the Plaintiff to go from London to Paris to Merchandise diverse goods to the profit of the Defendant, promised to give to him so much as should content him, and also to give him all and every sum of money which he should expend there in his Affaires, & further declared, that he was contented to have twenty five pounds for his labour, which the Defendant refused to pay: And exception was taken to the Declaration, because there is not set down any place or time of the notification of his contentment, for the same is traversable: Gawdy, the Rule here is, non Assumpit, ^{Assumpit} and therefore that matter as out of the Book, Cook: If one assume to pay twenty pounds to another upon request, although the Defendant plead, non Assumpit, yet if the place and time of request be not shewed, Judgement many times hath been stayed, for no Action without a Request, so here without notification of his contentment, no Action, therefore he ought to shew it: Gawdy, the ground of this Action is the Assumpit, but that cannot be certain without Declaration, and thereof notice ought to be given to make certainty of the duty, but not to enforce the promise, but in your case, without a Request Assumpit will not lye; But here it being but conveiance, the certainty of the time and place is not necessary to be shewed, but the generall forme shall serve, for it is but inducement: As if a man will plead a devise of goods to him, and assent of the Executors to take them, he need not to shew the time and place of the assent. Gawdy, at another day, said that Judgement ought to be given for the Plaintiff, the Assumpit is the ground and cause of the Action, and the shewing of the contentment is only to reduce the Action to certainty: And Judgement was given for the Plaintiff.

Trin. 30. Eliz. in the Kings Bench.

C L X V I I I. Musket and Coles Case

William Musket brought an Action upon the Case against Cole, and declared that in consideration, that the Plaintiff had payed unto the Defendant forty shillings, for the Debt of Symon his Son, the Defendant promised to deliver to him, omnes tales billas & Obligationes, in which his Son was bounden to him; which thing he would not doe, and it was found by Mervyn for the Plaintiff: And it was moved for Stay of Judgement, because the Plaintiff had not averred in his Declaration, that the said Defendant had

Averment.

Bils or Obligations, in which Simon his Son was bounden to the Defendant, for if there were none, then no damage. And see Onlies Case, 19 Eliz. Dyer 356. D, in consideration that the Plaintiff had expended divers summs of money circa the busynesses of the Defendant, promised, &c. Exception was taken to that Declaration by Mawwood and Mounson Justices, because it was not shewed, in what busynesses certain, and betwixt what persons. Gaudy, The Plaintiff here is not to recover the Bills or Obligations, but damages only, and therefore needeth not to alledge any Bills in certain. And 47 E 3. 3. A covenant with B, to assure unto B any his Heires, omnis, terras & tenementa quas haberet, in such Counties, and for not assurance, an Action of Covenant was brought, and the Plaintiff declared, that the Defendant had broken the said Covenant, and that he had required the Defendant to make a feoffment unto him of all his Lands and Tenements in the said Counties; and the plea was not allowed, for the Land is not in demand, but only damages to be recovered. See also 46 E 3. 4. and 20 E 3. And in the principal case, the Plaintiff hath time enough for the shewing to the Jury what Bills or Obligations for the instructing of the Jury of the damages.

Trin. 30. Eliz. in the Kings Bench.

CLXIX. English, and Pellitory and Smiths Case.

Assault and Battery.

In an Action of Trespass of Assault and Battery and wounding: The Defendants say, that they were Lessees of certain Lands, and the Plaintiff came to the said Lands, and took certain polls which were upon the Lands, and they gently took them from him: S pleaded, that he found the Plaintiff and P contending for the said Polls, and he to part them moliter, put his hands upon the Plaintiff, which is the same, &c. The Plaintiff replied, De iniuria suis propriis absque tali causa per ipsos P & S allegat, upon which issue was joined, which was found for the Plaintiff. It was moved in arrest of Judgment, that there was not any issue, for the Plaintiff ought severally to reply to both pleas aforesaid, for here are several Causes of Justification, and his Replication, absque tali causa, doth not answer to both. Cook, This word (Cause) is, nomen Collectivum, which may be referred to every Cause by the Defendants alledged, reddendo singula singulis, and their Justifications are but one matter, and the Defendants might have all joined in one plea. Wray, both pleas depend upon one matter, but are several causes, for two justifie by reason of their Interest, and the third for the preservation of the Peace. And by him and the whole Court, although it be not a good form of pleading, yet by reasonable construction this word (Cause) shall be referred to every cause, and so the pleading shall be maintained: And afterwards Judgment was given for the Plaintiff.

Nomen Col-lectivum.

Trin. 30. Eliz. In the Kings Bench. Intrat. Hill. 30. Rot. 58. or 581.

CLXX. Cater and Boothes Case.

Covenant.

In a will of Cobenant the Plaintiff declared, that the Defendant by his deed, bearing date the first of October, 28 Eliz. did covenant, that he would do every act and acts at his best endeavour to prove the Will of I S, or otherwise, that he would procure Letters of Administration, by which he might convey such a Term lawfully to the Plaintiff, which he had not done, sicut se-
p[er] requisitus, &c. The Defendant pleaded, that he came to Doctor Drury

into the Court of the Arches, and there offered to prove the Will of the said I S, but because the Wife of the said I S would not swear, that it was the Will of her Husband, they could not be received to prove it; Upon which it was demurred in Law. It was moved by Williams, that the Action doth not lie, for there is no time limited by the Covenant when the thing should be done by the Defendant, for which he hath time during his life, soz as much as it is a collateral thing. See 15 E 4. 31. if there be not a Request before; but admit that the Covenant had been to perform upon request, then the Plain Request, tis in his Declaration ought to have shewed an expresse request with the place and time of it, for tht it is traversable. See 33 H 6. 47, 48. 9 E 4. 22. Gawdy, If the Covenant had been exprely to do it upon request, there the request ought to be shewed specially: But when a thing upon the exposition of the Law only is to be done upon Request, such Request alledged generally is good enough. And by Wray, the Covenantor hath not time during his life to perform this Covenant, but he ought to do it upon request within convenient time; but in some case a man shall have time during his life, as where he be-
nefit shall be to any of the parties, as if the condition were to go to Rome: And as to the Request, he conceivd, that it ought to be shewed specially and certainly; for it is for the benefit of the Covenantee, for without request, the Action doth not lie which Clench granted. And it was holden by the whole Court, that the barre shall not help the insufficient Declaration: No more, if the Defendant plead Non Assumpsit, yet the defect in the Declaration of a Request not duly shewed remaineth. Gawdy, the bringing of the Action is a Request. Clench, a writ of Debt is a Preceipe, for which there, licet sapis re-
quiritur, is sufficient, but a writ of Covenant is not so.

Trin. 30. Eliz. In the Kings Bench.

C L X X I. Piers and Hoes Case.

In an Action of Trespass, it was found by special verdict, that A seized of Land in the right of his Wife, being her Joynature by a former Husband, he Trespassed, and his Wife made a feoffment to a stranger and his Heires, Habend to the use of the stranger and his Heires during the life of the Wife only. Shuttleworth, the same is a forfeiture, for if the same feoffment had been without any use expressed, then it should be to the use of the Feoffor and his Heires, and by consequence a forfeiture; and as the tale is here, it is also a forfeiture, for during the life of the Wife the use is exprely to the use of the Feoffor and his Heires, and the remainder of the fee simple is to the use of the Feoffor, scil. the Husband and his Heires. Popham, I conceive that here is forfeiture, for here are several limitations, limitation of the estate unto one, and of the use unto another: And the words (for the life of the Wife) do not referre to the estate but to the use, with proximum antecedens; And he resembled the same to the case of Leonard Sturton, in which he was of Counsel. A man granted Lands, Habend, unto the Grantee, to the use of the Grantee, and the Heires of his body; the same is no estate tail in the Grantee, but only an estate for life, for the Limitation of the use cannot extend the estate. Cook contrary. The case is, that A, Wife of one Piers, being Tenant for life of the Joynature of the said Piers, took to Husband Hoe, they both by Deed grant totum suum Messoagium to one Clarke, Hibendum to him and his Heires for the life of the Wife only, I conceive, that here is not any forfeiture, for it is but one intire sentence: And if there be a double construction of a deed, that which is most reasonable shall be taken, so as wrong be not done, and therefore these words (for the life of the Wife) shall referre unto both, scil. the estate and the use, and their intent was not to commit a forfeiture, as appeareth by the words of the Deed,

Construction
of Deeds.

for

Regula.

for they grant, solum messuagum, and that was not but for the life of the wife, ad solum usum, of the Feoffee and his Heirs, during the life of the wife, and violence should be offered to this wrod (solum) if the Feoffee or his Heirs, shold have ultra the life of the wife, and the wrod (tantum) cannot other wise be expounded, but that the estate for life only shall passe from them: And he cites the Case of 34. E. 3. Awowy 258. A gives Lands unto B in tail, and for defaile of such issue, to the use of C in tail, rending Kent, the same render shall goe to both the estates: So a Lease for life to A, the remainder to B, to the use of C, the same use geth out of both the estates, and not only out of the Remainder, so here upon the same reason, these words, for the life of the wife, shall refer to the first estate, as well as to the use; And in such Cases the rule of Bracton ought to be obserued, viz. Benignæ facienda sunt interpretationes verborum, ut res magis valeat, quam pereat. As the Case in 6 H. 7. 7. in a Cessavit, the Plaintiff counted, that the Tenant held by Homage, Fealty, Sute at Court, and certain Rent, and in the doing of the services alsoesaid, the Defendant had cesseid, and in not doing of Homage and Fealty, a man cannot cesse by two yeares; But it was holden that the said Cessavit should be referred to such services only, in which one might cease, and that is Sute of Court, and Rent; And if pleadings shall have such favourable construction, a multo fortiori, shall a deed, 4 E. 3. Wast 11. A man leased for life, and by the same deed granted power unto the Lessee, to take and make his profit of the said Lands, in the best manner should seem good to him without contradiction of the Lessor or his Heirs; yet by those words it is not lawfull for him to doe warr, for there it is said, that in construction of Deeds, we ought to judge according to that intent, which is according to Law and reason, and not to that which is against reason: See 17 E. 3. 7. accordingly, so in the principall Case, the words in the Deed of Feoffment shall be so expounded, that the estate be saved and not destroyed.

Popham contrary, the Cases put by Coke are not like to the Case in question, for where the Rent is out of both estates, the same is but reason, for the Rent is in respect of the Land, and because he de parts with both estates, it is reason the Rent issue out of both, and the like reason is of the Case of an use, for if a man makes a Lease for life to A, the Remainder over to B, the same shall be to their use respectively, and if he doe ex presse the use, the same shall be accordingly, and shall bind both estates, but there Clark hath two estates, one by the common Law, and the other by the Statute; But the words subsequent (so the life of the wife only) cannot refer to both estates: A. gives Lands to one and his Heirs for sofyte years, the same is but a plaine Term for years: But if a Feoffment in Fee be made to one and his Heirs to the use of another for sofyte years, there the Fee passeth to the Feoffee, and the Term to Cestuy que use, Gawdy conceived, that it is not any forfeiture, for these words (during the life of the wife only) were put in the Deed to expresse the intent of the parties, and therefore the same shall not be void, and he conceived that they were put in, to exclude the forfeiture, and therefore they shall serve for that purpose. And afterwards it was resolved by all the Justices except Gawdy, that it was a forfeiture, for by the Feoffment the Fee simple passeth, and that to the use of the Feoffee, and the estate, and the use are severall things, and the limitation for the life of the wife cannot extende to both: And as to the Book of 24 H. 8. Br. Forfeiture 87. Tenant for life aliens in Fee to B. Habendum sibi & hereditibus suis, for the Term of the life of the Tenant for life, the same is not a forfeiture, for the whole is but the limitation of the estate: And afterwards it was adjudged, that it was a forfeiture, Gawdy continuing in his former opinion: And Wray laid that he had conferred with the other Judges of their House, and they all held clearly, that it is a forfeiture.

Trin. 30. Eliz. in the Kings' Bench. Rot. 5 28.

C L X X I I . Toft and Tompkins Case.

Upon a speciall Verdict the case was, that the Grand-father, Tenant for life, the Remainder to the Father in taile, that the Grand-father made a feoffment in fee to the use of himself for life, the Remainder to the Father in Fee; And afterwards they both came upon the Land, and made a Feoffment to Tompkins the Defendant: Coke, there is not any discontinuance upon this matter, for the Father might well waine the advantage of the forfeiture committed by the Grand-father, then when the Father joynes with the Grand-father in a Feoffment, the same declares that he came upon the Land, without intent to enter for a forfeiture: It was one Waynmans Case, adjudged in the common Pleas, where the Distressee cometh upon the Land to deliver a Release to the Distressor, that the same is no Entry to revert the Land in the Distressor: Then here it is the Libery of the Tenant for life, and the grant of him in the Remainder, and he in the Remainder hore was never leased by force of the tail, and so no discontinuance: Godfrey, here is a Remitter by the Entry, and afterwards a discontinuance, for by the Entry of both, the Law shall adjudge the possession in him who hath right, &c. Gawdy, this is a discontinuance, for when the Father entred, ut supra, he shall be adjudged in by the forfeiture, and then he hath gained a possession, and so a discontinuance, for both cannot have the possession. Clench, the intent of him in the Remainder when he entred was to joyne with the Grand-father, and when his intent appeareth, that the estate of the Grand-father, and his own also shall passe, that doth declare that he would not enter for the forfeiture: Wute agreed with Gawdy.

Trinit. 30. Eliz. in the Kings Bench.

C L X X I I I Broake and Doughties Case. H. I. 31. Eliz.
R. 79d.

An Action upon the Case for words, viz. Thou wast forsworne in the Court of Requests, and I will make thee stand upon a Stage for it: At the Case for was found for the Plaintiff; It was moved in arrest of Judgement, that the Action upon words, I will make thee stand upon the Stage for it, they are not Actionable, and as to the residue of the words, I will make thee stand upon the Stage for it, they are not Actionable as it was adjudged between Rylie and Trowgood, if thou hadst Justice thou hadst stood on the Pillory, and Judgement was given against the Plaintiff: Daniel contrary, thou wast forsworne before my Lord chiefe Justice in an Evidence, these words are Actionable, for that is perjury upon the matter, and between Foster and Thorne, T. 23. Eliz. Rot. 882. Thou wast falsly forsworne in the Star-Chamber, the Plaintiff had Judgement, for it shall be intended that the Plaintiff was Defendant or a Deponent there: And yet the words in the Declaration are not in the Court of Star-Chamber. Wray, thou art worthy to stand upon the Pillory, are not Actionable, for it is but an implication, but in the words in the Case at the Bar there is a vehement intendment, that his oath was in the quality of a Defendant, or Deponent, which Gawdy granted, in the Case 28. Eliz. Thou wast forsworne in White-church

Church Court, there the words are not actionable; for that Court is not known to you as Judges. And it may be it is but a great House or Mansion house called Whit-church Court: But here in the principal case it cannot be meant but a Court of Justice, and before the Judges there juridice, and the subsequent words sound so much, I will make thee stand upon a stage for it. And afterwards Judgement was given for the Plaintiff.

Trin. 30. Eiz. In the Kings Bench.

C LX XIV. Gatesould and Penns Case.

Precipition
for tythes.

Gatesould Parson of North-linne libelled against Penne in the spirituall Court for tythes in Kind of certain pastures: The Defendant to have prohibition doth surmise, that he is Inhabitant of South-linne, and that time out of mind, &c. every Inhabitant of South-linne having pastures in Nord-linne hath paid tythes in Kind for them unto the Vicars of South-linne, where he is not resident, and the Vicar hath also time out of mind payed to the Parson of North-linne for the time being two pence for every acre. Lewis, this surmise is not sufficient to have a prohibition, for upon that matter Modus Decimandi shall never come in question, but only the right of tythes, if they belong to the Parson of North-linne, or to the Vicar of South-linne, and he might have pleaded this matter in the spiritual Court, because it toucheth the right of tythes, as it was certified in the Case of Bashly by the Doctor of the Civil Law. Gawdy, this prescription doth stand with reason, for such benefit hath the Parson of North-linne, if any Inhabitant there hath any Pastures in South-linne. And afterwards the whole Court was against the prohibition, for Modus Decimandi shall never come in debate upon this matter, but who shall have the tythes, the Vicar of South-linne, or the Parson of North-linne? and also the prescription is not reasonable.

Trin. 30. Eiz. In the Kings Bench.

C L XXV. Gomersall and Bishoppes Case. Hili. 31. Eiz,
R. 175.

Prohibition
for tythes.

Bishop libelled in the Spiritual Court for tyth Day, the Plaintiff Gomersall made a surmise, that there was an agreement betwixt the said parties, and for the yearly sum of seven shillings to be paid by Gomersall unto Bishop, Bishop faithfully promised to Gomersall, that Gomersall should have the tythes of the said Land during his life. And upon an Attachment upon a Prohibition Gomersall declared, that for the said annual sum Bishop leased to the Plaintiff the said tythes for his life: And upon the Declaration Bishop did denurre in Law for the variance between the Surmise and the Declaration, for in the Surmise a promise is supposed, for which Gomersall might have an Action upon the Case; and in the Declaration a Lease. But note, that the Surmise was not entered in the Roll, but was recorded by it self, and the Declaration only enrolled. Godfrey, it was resolved in the Case betwixt Pendleton and Hunt, that an Agreement betwixt the Parson and any of his Parishioners is a good cause to grant a Prohibition, if he libel in the Spiritual Court against such Agreement, because the Spiritual Court cannot try it, and they will not allow such a Plea. Curia, the Surmise is as a Will, for which if variance be betwixt the same and the Declaration all is naught.

Trin.

Trin. 30. Eliz. in the Kings Bench.

CLXXVI. Colbourne and Mixstones Case. *Intra*t*. Hill. 31.
*Eliz. Rot. 146.**

Colbourne was sued in the Spiritual Court, for that being Testator to one Alice Leigh, he had not brought in a true Inventory of all the goods of the said Alice, but had omitted and left out a lease of two houses, and this suit was at the pursuit of two Daughters of the Testator. Colbourne saith for a Prohibition; and surmises and declares, how this Lease is extinct, and the matter was this, H Leigh was seised of a house called the Marigold, and two other houses in London, and leased the said two houses to one Alice Cheape for one and twenty years, if she shoulde live so long, and afterwards made a Lease in Reversion of the said two houses to the said Alice Leigh for one and twenty years, and afterwards he devised these two houses, and also the house called the Marigold to the said Alice Leigh for her life for to bring up his children, and dyed, after whose death the said Alice Leigh entered into the said house called the Marigold, and took the rents and profits of the said two houses for the space of seven years, virtue testament. prdict. upon which Declaration the Defendants do demurre in Law. Cook, the Declaration is not good, and for the matter of it, it is clear, that by this devise unto Alice, her Term in future is not Extinguished without her agreement to it: And also in this Case the Devise is not made for the benefit of the said Alice Leigh but of her children, and she hath a liberty to accept or refuse the said estate by devise, and to make her election: And the Plaintiff hath declared, that she hath accepted the Rent reserved upon the Lease of the said two houses for seven years: And therewithal Declaration made in divers respects. 1. He hath declared, that the said Alice Leigh hath accepted the Rents of the said two houses, by reason of the reversion, & virtue Testament. prdict. by seven years, which is double and treble, to acceptance of a Rent at one day, scil. one rent day is a sufficient election: As if the Issue in tail, after the death of his Ancestors, who hath made a Lease not warranted by the Statute, once accepts the Rent, the Lease is affirmed, but if in plea pleading, the acceptance of the said Rent for three years be pleaded, the same clearly is not good, for no good Issue can be taken thereupon: 2. This acceptance is not pleaded (as the Law wills), and in the phrase of the Law, viz. to which devise she agreed, but pleads the acceptance of the Rent, which is matter of evidence, the which is not good pleading. As 5. H. 7. 1. One sweareth another to enter into his Land, and the same to occupy for a certain time, the same is a Lease in Law; and if in pleading the party is to make his title to the same Land, he ought plead it as an express Lease, and not as a Licence; and if the Lease be traversed, he may give the Licence in evidence. Tamefield presently by the devise, The estate for life is in the Devisee and the Term extinct by it, and that is sufficient for the Plaintiff: And if there ^{was any disagreement} the same is to be shewed on the other side. But if ^{ted.} Alice had not notice of the Devise, but dyeth before notice, the same amounteth unto a disagreement. And as to the pleading of the Agreement, I conceive it is well enough pleaded, for if the Lease had not been she might have entered, then if such Entry had been pleaded it had been good enough, and then because she could not enter by reason of the said Lease, she hath taken the rents and profits which is an actual agreement; and as wrong as an Entry. Also we have shewed that she had entered into the house called the Marigold, of which the Devisee dyed seised in possession, and that is a sufficient agreement for the whole, for it is an entire Legacy. As 18. E. 3. Warriance 63. If the ^{Assent not to} Devise of three acres be granted, and the Tenant for life attorney for one a. ^{be apportioned} ed.

cre, it is a good assent for the whole, for he cannot appportion his assent: and 2 E 4. 13. If the Executor deliver unto the Devisee goods to him delivered to redeliver them to him again at such a day, the same is a good assent, and execution of the Devise, and the words of the re-delivery are void. Gawdy, The devise doth not vest the estate in the wife until agreement, where a man takes in a second degree, as in a Remainder the same vests presently before agreement, but where he taketh immediately it is otherwise, and he held the agreement was well enough pleaded. Wray presently upon the death of the Testator, the free-hold rested in the Devisee, and if it was not an Agreement, ut supra, by taking of the rents, yet the entry into the Marigold was a consent, and an Execution of the whole Legacy; and as to the rest he agreed with Gawdy. Clenci, the free-hold rested presently in Alice Leigh before agreed, also the entry into the Marigold is an execution of the whole Legacy to the Devisee, for her entry shall be adjudged most beneficial for her; and that is, for all the three houses.

Trin. 30. Eliz. in the Kings Bench.

CLXXVII. Stranham and Medcalf's Case

No Prohibiti-
on for costs in
the spiritual
Court.

STRANHAM libelled in the Court of the Bishop of Norwich against Medcalf, for a portion of Lythes, as Farmer of the Rectory of Dunham: The Parson of Stonham came in and said, that the Land, whereof the Lythes are demanded, is in his Parish of Stonham, and not in the Parish of Dunham; and afterwards sentence passed against Stranham; who brought an Appeal, and notwithstanding that, by the Statute of 32 H. 8. cap. 7. the spiritual Judges may proceed to make process against the Appellant for costs, for the principal matter, scil. parcel, or within such a Parish or not is tryable at the Common Law. Cook now prayed a Consultation; and he confessed (ut supra) that the matter was tryable at the Common Law; but yet the costs were not given for the matter, but for the unjust vexation, and it was his suit and own act to prosecute the same in the Spiritual Court. Note, that Stranham had a Prohibition to stay the proceedings for the costs, for in some cases the Plaintiff himself, who libelleth, may have a Prohibition, and that was the case betwixt Wignal and Brook. And afterwards a Consultation was granted by the Court, for Stranham had begun the suit in the Spiritual Court in the principal matter, and therefore he cannot have a Prohibition for the costs. But afterwards Judgement was stayed, for the said Statute speaks specially in case of Lythes, where the Court hath Jurisdiction, and here it hath not of the matter: But it was said, that if a Consultation be once granted, the party shall never have another Prohibition in the same cause, as it was holden in the case betwixt Hoskins and Jones.

Pasch. 31. Eliz. Rot. 186. In the Kings Bench.

CLXXVIII. Chamberlain and Thorps Case.

Recognizan-
ces in London,

In Debt upon a Recognizance acknowledged in London, the Plaintiff declared, that London is antiqua Civitas, and that they have used time out of mind, &c. That the Mayor take Recognizances of any person being of full age, and not a Feme Covert, every day in the year, except Sundayes, Holy Dayes, Council dayes, and dayes of Quarter Sessions and Gaole-delivery; And declared further, how that the Defendant such a day did acknowledge a Recognizance to him, &c. Fanfield, the Declaration is not good, but the cu-

Custome, as it is laid, Is unreasonable, for thereby, the Mayor might take Recognizances of Idiots, men of Non sanx Memoriam, &c. nor is it restrained to any persons, or to any matters, but is too general, and therefore cannot be a good custome: Gawdy, the Declaration is good notwithstanding the Exception for want of averment, for that ought to come in on the other side. And as to the custome I conceive it is not good, for it is hard. That they should take Recognizances of all Persons, and for all Causes which rise out of the City, and through the whole Realm, as well as within the City: also none shall take a Recognizance, but a Judge of Record, and a Recognizance cannot be taken by prescription. As to the first Exception, Wray agreed with Gawdy, and as to the Custome, he held the same to be good. For it hath been allowed, and their customes are confirmed by Act of Parliament which makes them good. But if the custome be not confirmed by Parliament it is not good; also it is not an unreasonable Custome, for it is for the benefit of the Subjects to have security for their debts. Cook, The Recognizance makes the Debt locall, and therefore 13 Rich. 2. btr 649. Debt was brought in London upon a Recognizance acknowledged in the Chancery at Westminster, and the Writ was abated; for the Recognizance makes it locall there; and by him the custome stands with reason. The Mayor is such a person who may take a Recognizance, for he is a Judge of Record. See 1 H. 7. 20. and Br. Recognizance 8. and the Recognisee cannot have an Action of Debt upon this Recognizance elsewhere then in London. For it is not a debt out of the Jurisdiction of the Court, for the Recognizance hath made it local. Wray, If the Recognizor be within age, the same shall come in of the other side, and the Plaintiff needs not shew the same in his Declaration. Cook, It was agreed betwixt Mabbe and Frend, That such a Recognizance was good. Tansfield, the said Recognizance was taken for Orphans goods which is a thing within their Jurisdiction. Clench, They of London cannot take Recognizance of more then they can hold plea of it. Wray, they have used of long time to take Recognizances, and their customes are confirmed by Parliament, and a more strange custome then this hath been allowed of here before, sci. That a feme Covert shall sue an action alone without her Husband, for she is a sole Merchant; Also they do certiss Recognizances ore tenus. Gawdy, a feme Covert may have an action within the City, but not here.

Hil. 32. Eliz. R. 1. 434 In the Kings Bench.

CLXXIX Pierce against Howe

Action upon the Case for these words, Pierce hath taken a false Oath Action upon
in the Consistory Court of the Bishop of Exeter, and upon the Decla- the case for
ration, the Defendant did demur in Law. And by Prideaux these words are words.
actionable, although the perjury be supposed to be committed in the spiritual
Court; for he shall be excommunicated if he will not appear, and he shall
do penance in a white sheet, which is as great a disgrace as to be set upon
the Pillory. And it was ruled in an action upon the case betwixt Dorrington
and Dorrington, upon those words, Thou art a Baskard, that an action ly-
eth, and yet Baskardy is a spiritual matter, and there determinable; so
for these words Thou art a Pirat, an action lyeth, and yet Piracy is not
punishable by the common Law, but in the Court of Admiralty. And these
words, He hath taken a false oath, do amount to these words, He is sofsworx.
Wray conceived, that the words are not actionable, for there is a proviso in
the Statute of Eliz. cap. 9. That the said Act shall not extend to any Ecclesi-
astical Court, but that every such offender shall be and may be punished by
such usual and ordinary Lawes as heretofore hath been, and is used, and

frequent in the said Ecclesiastical Court, Gaudy upon these words, an action doth not ly, for they are not pregnant of any perjury in the Pl. for he may be never partie in it: for if one of the Masters of the Chancery minister an Oath unto any person, or any Commissioners, &c. and the Plaintiff swearth falsely, a man may say, That the Master of the Chancery, or the Commissioner hath taken a false oath: and yet he is not guilty of falsity. And afterwards Wray, mutata opinione, That the Proviso in the said Statute, is to this intent, That notwithstanding the said Statute, such an offence may be enquirable and examined in the Ecclesiastical Court in such manner as it was before, but the same doth not take away or restrain the authority of the Common Law, but that such an offence may be here examined. And it hath been lately adjudged in the Star-Chamber, That such perjury was examinable there, for it is not restrained: and as to the latter exception, upon these words (he hath taken a false oath) it shall be intended activelie, and not passively. and if so, the defendant ought to have so pleaded it, and afterward judgement was given for the Plaintiff.

Tri. 30. Eliz. In the Kings Bench.

C L X X X. Palmer and Smalbrookes Case.

In an action upon the Case by Palmer against Smalbrook, The Plaintiff declared, That the Defendant had recovered a certain debt against A, and thereupon purchased a writ of Capias against A to take his body and delivered the said Capias to the Plaintiff being then Sheriff, and prayed a warrant for the serving of the said Capias; and that he would name in it, one B for special Bailiff, and promised the Plaintiff that if B arrested A by force of the said Capias, and suffered him to escape, That he would not sue the Plaintiff for the escape: and shewed further, That he made a Warrant according to the said Capias, and therein named and appointed the said B. his special Bailiff, who arrested A accordingly and afterwards suffered him to escape, and the Defendant notwithstanding his promise aforesaid, sued the Plaintiff for the said escape. And it was found for the Plaintiff; It was moved in arrest of Judgement, That the promise is against the Law, to prevent the punishment inflicted by the Statute of 23 H. 6. upon the Sheriff, and it is merely within the Statute, and so the promise void. Cook, The same is not any Bond or promise taken of the Prisoner, nor of any for him, and therefore it is not within the Statute, and it was Danvers Case. Wray, A promise is within the Statute as well as a Bond but the Statute doth not extend but where the Bond or promise is made by the prisoner, or by any for him; And after Judgement was given for the Plaintiff.

Hill. 30. Eliz. In the Common Pleas.

C L X X X I. Mounson and West's Case.

To Trespass by Mounson against West, the Jury was charged and evidence given, and the Jurors being retired into a house for to consider of their evidence, they remained there a long time without concluding any thing; and the officers of the Court who attended them seeing their delay, searched the Jurors if they had any thing about them to eat, upon which search it was found, that some of them had figs, and others pippins, for which the next day the matter was moved to the Court, and the Jurors were examined upon it upon Oath. And two of them did confess that they had eaten figs before

they had agreed of their verdict: and three other of them confessed, That they had Pippins, but did not eat of them, and that they did it without the knowledge or Will of any of the parties. And afterwards the Court set a fine of five pounds upon each of them which had eaten, and upon the others who had not eaten forty shillings. And they would advise, if the verdict was good or not, for the Jury found for the Plaintiff. And afterwards at another day, the matter was moved, and Anderson was of opinion, That notwithstanding the verdict, the said Jurors were not given to them by any of the parties to the action, nor by their means, or procurement. Rhodes thought the contrary, because some of the Jurors had eaten, and some not, contrary if all of them had eaten. See 14 Hen. 7. 1. A Jury was charged and before their verdict, they did eat and drink, and it was holden that upon that misdeemeanour, their verdict was void, for which cause a *ventre facias de novo* was awarded. And it was prayed by the Counsel of the Defendant West, That the said misdemeanour so found by examination might be entered of Record, which the Court granted. And afterwards at another day, the matter was moved again. And upon great advise and deliberation, and conference with the other Judges, The verdict was holden to be good notwithstanding the misdeemeanour aforesaid. See 24 E. 3. 24. 15 Hen. 7. 1. 2. Hen. 7. 3. 29 Hen. 8. 37. and 35 Hen. 8. 55. Where it was holden, where the eating and drinking of the Jury at their own costs is but fineable, but if it be at the costs of any of the parties, the verdict is void. And see Book Entries 231. The Jurors after they went from the Bar ad leipso of their verdict to be advised, comederunt quasdam species, scilicet raisins, dates, &c. at their own costs, as well before, as after they were agreed of their verdict; And the Jurors were committed to prison; but their verdict was good, although the verdict was given against the King.

Hill. 30. Eliz. In the Common Pleas.

C L X X X I I . Hunt and Gilborn's Case.

J. Dower brought by Hunt and his Wife against Gilborn. The Defendant Dower of Gavelkind, and that the custom is, That in Dower of Land of such nature, the Wife ought to be endowed of the moiety of such Land, *Tenendum quatinus non maritata remanserit, & non aliter*: upon which plea in bar, the Defendants did demur in Law; and the Lord Anderson was of opinion, That the Custom is strongly pleaded against the Dower in the affirmative with a negative & non aliter, and that is confessed by the Demurree, That Dower out of such Land ought to be so allotted, and so demanded, and in no other manner. And by Periam, If those words (& non aliter) had not been in the Plea; yet the Defendants should not have Judgement: For Dower by moiety, & non maritatis, is as proper in case of Gavelkind, as Dower of the third part of Land, at the Common Law, and as the descent in such case of Lands to all the Sons. And afterwards Judgement was given against the Defendants.

Hill. 30. Eliz.

CL XXXIII. The Case of the Provoſt and ſchollars of Queeneſ Colledge in Oxford.

The Provoſt, Fellowes, and ſchollars of Queeneſ Colledge in Oxford, are Guardians of the Hospital, or Meaſon de Dieu, in Southampton. And they make a Lease of the Land parcel of the ſaid Hospital to one Hazel for Term of years by the name Prepoſitus ſocii & Scholares Collegii reginalis in Oxonia, Gardianus Hospitalis, &c. And in an Ejctione firme upon that lease, It was found for th: Plaintiffs, and it was objected in arrest of judgement, That the word Gardianus, ought to be Gardiani, for the Colledge doth conſiſt of many persons, and every person is capable, and it is not like unto Abbot and Cobent: But the whole Court was of opinion, th: t the Exceſſion was good, but that as well the Lease as alſo the Declaration was good, for the Colledge is one bodie, and as one person: And ſo it is good enough Gardianus.

Hill. 30. Eliz. in the Common Pleas.

CL XXXIV. Wooden and Hazelſ Case.

Nisi Prius. In an Ejctione betwixt Wooden and Hazel they were at iſſue upon, Not Guilty: and a Venire facias awarded returnable, Tres Trinit. And the Esſoin adjudged and adjoined by the Plaintiff untill Michaelmas Term; And at the next Assizes, the Plaintiff notwithstanding that Esſoin, and the adjoinment of it procured a Nisi Prius, by which it was found for the Plaintiff: And now it was moved in Court for the Day of Judgement, because no Nisi Prius ought to iſſue in the Case. For the Esſoin was adjudged and adjoined untill Michaelmas Term by the Plaintiff himſelf. And Lennard curſos Breuium ſaid, That the Words of the Statute of Westminster 2. cap. 17. Postquam aliquis poſuerit ſe in aliquem inquisitionem ad proximum diem alloct. eiſſion. imports, That the Esſoin ſhall not be taken at the return of the Proces against the Jury, although the Jury be ready at the Day. Anderson was of opinion, That the awarding of the Nisi Prius ut ſupra, is but a misawardng of the Proces, and then relived by the Statute. And afterwards the case being moved at another day, the Court was cleat of opinion, That no Nisi Prius ought to iſſue forth in this case, because that the Plaintiff hi. ſelf, by the adjourning of the Esſoin, caſt by the Defendant untill Michaelmas Term, had barred himſelf of all Proceedings in the mean time: But afterwards it was ſurmised to the Court on the Plaintiff's part, that he the Defendant was not esſoined, for the name of the Defendant is Edward Hazel, and it appeared upon the tryal that Edward Russel was esſoined, but no Edward Hazel, and then if no Esſoin, no adjoinment, and then the Plaintiff is at large, &c. and may proceed, &c. But the Remembrance of the Clark was Edward Hazel, as it ought to be, and yet it was holden of no effect, being in another Term: And afterwards the Counsel of the Defendant prayed, That the Roll in hac parte, be amended according to the Remembrance of the Clark: But the Court utterly denied th: t, for no Statute gives amendment, but in the affirmance of Judgements, and Verdicts, and not in doteazance of Judgements or Verdicts: and afterwards it was resolved by the whole Court, That Judgement be entred for the Plaintiff.

Amendment.

Hill.

Hil. 32. Eliz. Intraitor M. 29. and 30. Eliz. Rot. 2116.

C L X X XV. Sir Henry Goodiers Case.

I þan Ejectione firmæ the Case was, Sir Ralph Rowlet possessed of certain Lands soþ years, made his Will, and ordained Sir Nicholas Bacon, Kev'þer of the great Seal of England, Sir Robert Catline, Lord Chief Justice of England, Justice Sowchole, and Gerrard Attorney General his Executoz, and dyed. And afterwards the said persons named Executoz, sent their Lett' Renouncing to the Chieþ Officer of the Pþerogative Court as followeth. Whereas of an Executorship. our Loving friend Sir Ralph Rowlet Knight, lately deceased, made and oþ, dained us Executoz of his last Will, and whereas our Businels is so great, That we cannot attend the execution of the said Will, Therefore we have thought good to move the bearer hereof M. Henry Goodier one of the Co-heirs of the said Sir Ralph to take upon him the execution of the said Will. And therefore we pray you to grant Letters of Administration in as ample manner as the Justice of the cause doth require; and afterwards an Entry was made in this manner in the same Court. Executores testamenti predicti. executionem inde super se assumerent & adhuc distarent: And upon that the said Goodier obtained Letters of Administration, and granted a Lease to A soþ years, of which the said Sir Ralph Rowlet dyed possessed. And afterwards Sir Robert Catline claiming as Executoz, granted the same Term to another, &c. and all the matter of difficulty was, If this Letter written by the Executoz be a sufficient Renunciation of the Executorship in Law, so as the Executoz cannot afterwards claim oþ use the said authority, &c. 2. If the Entry of the said Renunciation be sufficient and effectual. And it was argued by Ford, one of the Doctorz at the Civil Law, That as well the Renunciation as the Entry of it is good and sufficient in Law, so that none of the Executoz could after entermeddle. And he said, That in their law, there is not any certain form of Renunciation, but if the meaning and intention of the Renouncer appeareth, it is sufficient without any formall Termes of Renunciation: And he put many rules and Marimes in their Law to the same purpose. Ego dico me nolle esse hæredem, are sufficient words to such intent. Non vult hæres esse quin ad aliam transference debet hæreditatem. Qui semel repudiavit hæreditatem non potest eam repetere. Quod semel placuit, post displicere non potest; variatio non permititur in contractibus. So that after the Executoz have signified to the Officer of their Court their pleasure to renounce the Execution of the Will, they cannot afterwards intermeddle, nam interest reipublicæ ut dominia rerum sint in certo. And as to the Entry of the said Renunciation inter acta Curia, distulerant et adhuc distarent, that was the erroz of the Clark. And it is a Rule in our Lawe, veritas rerum gestarum non vitianur Errore factorum. And the Lord Anderson demanded of the said Doctorz, how far those words hæres, et hæreditas did extend in their Law, who answered, That hæreditas comprehends all Chattells, as well real as personal, Inheritance as Chattells, soþ by their Law, Hæreditas nihil aliud est quam successio in universum ius quod defunctus habuit tempore mortis suæ. And afterwards the Court gave day to the other party to hear an Argument of their side, but the case was so clear, That no Professor of the Civil Law would be retained to argue to the contrary. And afterwards Judgement was given, That the said Renunciation, and the entrie of it was sufficient.

Mich. 30 Eliz. in the Common Pleas.

C L X X X V I . Littleton and Pernes Case.

Debt.

Littleton brought Debt upon an Obligation against Humphry Pernes, who pleaded, that the said Obligation was endorsed with this condition, for the performance of certain Articles and Covenants contained in certain Indentures, by which Indentures the Plaintiff first covenanted, that Edward brother of Humphry should enjoy such Land until the first of Michaelmas next following, rendering such Rent at the end of the said Term: and the said Humphry covenanted, that the said Edward at the Feast aforesaid should surrender quietly and peaceably the said Lands to the Plaintiff, and that the said Plaintiff to such of the said Lands as by the custom of the Country, tunc jacebant frisia, should have in the mean time free ingress, egress, &c. at his will and pleasure, with his servants, ploughs, &c. And as to that Covenant, the Defendant pleaded, Quod permittit querentem habere iractionem & exitum, &c. in tales terras, quales tunc jacebant secundum consuetudinem patris, &c. And Exception was taken to this plea, because he hath not shewed in certain, which Lands they were which then did lie Fracy, according to the customs of the Country; which Anderson allowed of, but Walmsley strongly insisted to the contrary: And he confessed, that where an Act is to be done, according to a Covenant, he who pleads the performance of it ought to plead it specially; but as our case is, here is no Act to be done, but a permission as aforesaid, and it is as in the Negative, a not disturbance, in which case, permission is a good plea, and then it shall come on the other side on the Plaintiff's part, to shew in what Lands the Defendant non permittit: Which difference was agreed, 17 E. 4. 2. 6. by the whole Court. And such was the opinion of the whole Court in the principal case.

Another Exception was taken to it, that the Defendant had covenanted, that his brother Edward should pay to the Plaintiff the said Rent; To which the Defendant pleaded, that his said brother had payed to the Plaintiff before the said Feast of Michaelmas, in full satisfaction of the said Rent, three shillings, and that was holden a good plea; and upon the matter the Covenant well performed, for there is not any Rent in this Case, for here is not any Lease, and therefore not any Rent. For if A covenant with B, that C shall have his Land for so many years rendering such a Rent, here is not any Lease, and therefore neither Rent. But if A had covenanted with C himself, it had been otherwise, because it is betwixt the same parties. And if the Lessee covenant to pay his Rent to the Lessor, and he payeth it before the day, the same is not any performance of the Covenant, causa patet, contrary of a sum in gross: Another Covenant was, that the said Humphry solveret ex parte dicti Edwardi 20 l. to which the Defendant pleaded, that he had paid ex parte dicti Humfridi 20 l. and that defect was holden incurable, and therefore the Plaintiff had Judgement to recover.

Mich. 30 Eliz. in the Common Pleas.

C L X X X V I I . Gesslin and Warburtons Case.

In an Ejctione firmæ by Joan Gesslin against Hen. Warburton and Sebastian Crispe of Lands in Dickilborough in the County of Norfolk, Mich. 30. and 31 Eliz. rot. 333. upon the general Issue, the Jury found a special verdict, that before the Trespasser supposed one Martin Frenze was seised of the Lands,

Lands, of which the Action was brought in tail to him and the Heires males of his body, and so seised suffered a common Recovery to his own use, and afterwards devised the same in this manner: I give my said Land to Margaret Deviles, my wife, until such time as Prudence my Daughter shall accomplish the age of nineteen years, the Reversion to the said Prudence my Daughter, and to the Heires of her body lawfully begotten, upon condition that she the said Prudence shall pay unto my said wife yearly during her life, in recompence of her Dower of and in all my Lands twelve pounds, and if default of payment be made, then I will that my said wife shall enter and have all my Lands during her life, &c. the Remainder, ut supra, the Remainder to John Frenze in tail, &c. Martin Frenze dyed; Margaret entred, the said Prudence being within the age of fourteen years; Margaret took to Husband one of the Defendants, John Frenze being Heire male to the former tail brought a Writ of Error upon the said Recovery and assigned Error, because the Writ of Entry upon which the Recovery was had, was Precipe quod reddat unum Messuag. and twenty acres prati in Dickleborough Lynford Hambleton, without naming any Town; And thereupon the Judgment was reversed. And it was further found, that in the said Writ of Error, and the process upon it, no writ of Seire facias issued to warne dictam Prudentiam tenet existentem liberi tenementorum, ad ostendendum quid haberet, vel dicere scaret quare Judicium predictum non reveraretur: The Jury further found, that the said Margaret, depending the said Writ of Error, was possessed, virtute Testamenti & ultima voluntatis dicti Martini, revertione inde expectant, dictae Prudentiae propter lex postulat: And they further found, that six pound of the said twelve pounds were unpaid to the said Margaret at the Feast, &c. and they found, that the said John Frenze, praetextu judicii sic reverrat, entered into the premises as Heire male, ut supra. And so seised, a Fine was levied betwixt John Frenze Plaintiff, and one Edward Tyndal, and the said Prudence his wife Defendants, and that was to the use of the said John Frenze: And that afterwards Humphry Warberton and the said Margaret his wife, brought a Writ of Dower against the said John Frenze, Edw. Tyndal, and Prudence his wife, of the said Lands: The said Edward and Prudence made default, and the Defendants counter against the said Frenze, and demanded against him the moiety of the third part of the said Lands: To which the said Frenze pleaded, that the default of the said Edward and Prudence, idem Joh. Frenze nomine non deber, quia he said, that he the said John was sole seised of the Lands aforesaid at the time of the Writ brought, &c. and pleaded in Barre, and it was found against the said John, and Judgement given for the Defendants of the third part of the whole Land, and seisin accordingly: And that afterwards, 17. Eliz. the said Frenze levied the Fine to the said Tyndal, to the use of the said Tyndal and his Heires: And they found, that after the said Feast, the said Henry Warberton and Margaret his wife came to the Heslinge aforesaid half an hour before sunset of the said day, and there did demand the debt of the said twelve pounds, to the said Margaret, by the said Martin Frenze devised, to be paid unto them, and there remained till after sunset of the said day, demanding the Rent aforesaid, and that neither the said Tyndal nor any other was there ready to pay the same.

And first it was moved, if the said yearly sum of twelve pounds appointed to be paid to the said Margaret were a Rent, or but a sum in grosse: And the opinion of the Court was, that it was a Rent, and so it might be fitly collected out of the whole Will, where it is said, that Prudence his Daughter should have the Land, and that she should pay yearly to Margaret twelve pounds in recompence of her Dower, &c. But if it be not a Rent, but a sum in grosse, it is not much material to the end of the case: For put case it be a Rent, the same not being pleaded in barre, the Dower is well recovered, and then when default of payment is made, if the wife of the Devisee shall have the whole,

was the Question : And the Court was clear of opinion, that by the Sute and Judgement in the Writ of Dower, the Wife of the Devilor had lost all the benefit which was to come to her by the devise : For the said Kent was debised to her in recompence of her Dower, so as it was not the meaning of the Devilor that his Wife should have both. And therefore by the Recovery in Dower she had dismissed her self of the Kent, and by consequence of the benefit of the penalty for not payment of it.

Hill. 30. Eliz. in the common Pleas.

CL XXXVIII. Stephens Case.

Fines levied
raise an use.

In an Ejectione from the case was, that the Father covenanted with one A, that in consideration of a Marriage to be had betwixt the Son of the Covernant and the Daughter of A, that he before such a day would levy a Fine, which Fine should be to the uses of the said Son and Daughter in tail for the Joynure of the Daughter. The Fine is levied according to the uses aforesaid : The Father dyeth, but in the Fine no mention is made of any marriage had : And upon that matter the Court was clear of opinion, that notwithstanding that the marriage was not accomplished, yet the estate tail was well enough executed in the Son and Daughter, for the Fine without any consideration doth carry the uses, but without a Fine such a consideration would not raiseth an use without accomplishment of the marriage, for the consideration executed ought to produce the use. But in this case the uses are perfected by the Fine, and A upon the matter might have had covenant against the Father to have the fine before the marriage.

Mich. 30. Eliz. in the Common Pleas.

CL XXXIX. Billford and Foxes Case.

Debt.

Supersedes by
the Husband
is not good for
the Wife.

Billford brought an Action of Debt against Fox and his Wife, Executrix of Bone A her former Husband, process continued against them, till the Crigent, upon which the Husband appeared, and put in a Supersedesas for himself only, without making mention of his Wife, and the case being moved to the Justices, they demanded of the Preignothozies what was to be done, for the same is practise and a dangerous case for example. And it was answered by the Preignothozies, that the Court cannot remedy it, for now by the Supersedesas the Husband is sine die, for he shall not be driven to answer without his Wife, as this case is, and he is impleaded, as in the right of his Wife, and therefore the Wife shall be waived, and the Husband discharged. See the Book of Entries 187. Debt against the Husband and Wife, and process continued until the Crigent, the Husband rendered himself, and the Wife was waive, and Judgement given, quia videbitur Justiciariis hic that the Husband absque prefata uxore sua respondere non potuit, & rationi dissolum sit, ipsum in Coria sic, cum in eadem loquela respondere non potuit, ulterius detineri, ideo eat inde sine die. And so see 43 E 3. 18. Detinue against the Husband and Wife, the Wife is waive, and the Husband rendered himself at the Crigent. And the point of the Action was upon a bayment to the Wife, tunc sola fuit, and the Husband was sine die, for he could not answer in such case without the Wife. But at the last the Justices advised thereof, and gave order that the Supersedesas shold be stayed without recording the appearance of the Husband. And by Anthrobus one of the Attorneys of the Court, that was the case of the Lady Malory and her Husband, who were sued in an

Action

Action of Debt, and process continued against them till the Exigent, upon which the Husband appeared and put in a Supersedeas for himself, without speaking of his Wife; and his Supersedeas was not allowed, but process continued until Out-lawry.

Hill. 30. Eliz. in the Common Pleas.

C X C. *The Queen against the Bishop of Canterbury and others.*

The Queen brought a Quare Impedit against the Archbishop of Canterbury, the Bishop of Chichester, and the Incumbent: And counted, that Ashburnham was seized of the Advowson, and that he was out-lawed in an Action personal at the suit of such a one, and heived the whole Out-lawry certain. And Exception was taken to the Count, because in the setting down of the Out-lawry, the process is alledged to be returned by the Sheriff, but the name of the Sheriff is not there expressed. As to that, it was agreed by the Court that the truth is, that it is provided by the Statute of 12 E 2. cap. 3. That the Sheriffs in their returns put their names to the said Returns; but it is not requisite so to plead it, for the omitting thereof doth not make the Return void, but the Sheriff shall be amerced.

Quare Impedit.
dit.

Another matter was objected, so that whereas the Patron had pleaded one plea, and the Incumbent the same plea by himself in barre. The Queen demurred in Law in this manner quoad separalia placita per dictos, &c. sepe-
ratis placitatis. &c. Dicta Domina Regina necesse non habet, nec per legem terrae tenetur, respondere: And the Court was clear of opinion, that the Demurrer ought to have been several, upon the plea of the Patron by it self, and upon the plea of the Incumbent by it self.

Hill. 30. Eliz. in the Common Pleas:

C X C I. *Mallet and Ferrers Case.*

In Trespass of Battery; the parties were at Issue upon, Not guilty, and Damages in-
 Lat the Nisi prius it appeared, that the thumb of the right hand of the Plaintiff, created of a
 tif was clean cut off, and so maimed; And it was found for the Plaintiff, and Mayhme by
 damages taxed to forty pounds, and now the party came in person into Court, the Court,
 and prayed, in respect of the heynousnesse of the Mayhme, that the Court
 would encrease the damages; which damages, upon great consideration had,
 were made one hundred pounds, and Judgement given accordingly. See that
 the cutting of any of the Fingers is a Mayhme, 28 E 3. 54. by Stone;
 and as for the damages further assessed by the Court, then the damages taxed by
 the Jury, See Book Entries, 46. 8 H 4. 135. 39 E 3. 20.

Hill. 30. Eliz. In the Common Pleas.

C X C II. *Atkins and Hales Case.*

Richard Atkins of Lincolnes-Inne brought a Writ of Forger of false Faits
 against Hale of Gloucester, and counted upon the forger of an Indenture, Forger of
 in quo continetur quod quidam Abbas Monasterii de Gloucester Demisit sci-
 tum Manerii de R. & terras dominicales, &c. The Defendant pleaded, Not
 guilty. And it was given in evidence on the Plaintiffs part, a Lease suppos-
 ed to be made and forged, containing that the said Abbot leased the said Scite,

Chamberlain and Oldfeild and Willmers Case. { The Lord Dudley and
Stauntons Case { *Lacyes Case.*

and all the demeine Lands of the said Hammor, exceptis duobus separatis clausuris inde, &c. vocat. &c. And it was moved, if this Evidence doth maintain the Issue. And it was holden by the whole Court, that the Evidence was good enough, for it is not necessary to construe terras Dominicales, omnes terras Dominicales, for the Lands not excepted are terre Dominicales, and so the Count is satisfied by that Evidence, &c.

Hill. 30. Eliz. In the Common Pleas.

C XCIII. Chamberlaine and Stauntons Case.

Deeds, and sealing of them.

Chamberlaine brought Debt upon an Obligation against Staunton, and upon non est factum, the Jury found this special matter, that the Defendant subscribed and sealed the said Obligation, and cast it upon a certain table, and the Plaintiff took it without any other delivery, or any other thing amounting to a delivery. And the Court was clear of opinion, that upon that matter the Jury had found against the Plaintiff, and it is not like the case which was here lately adjudged, that the Obligor, subscribed and sealed the Obligation, and cast it upon a table, laying these words, this will serve, the same was holden to be a good delivery, for here is a circumstance, the speaking of these words, by which the will of the Obligor appeareth, that it shall be his Deed.

Hill. 30. Eliz. In the common Pleas.

C XCIV. Oldfeild and Willmers Case.

In a Debt upon an Obligation, the Defendant pleaded, that the Obligation was endorsed with condition, that the Defendant should stand to the Award of 1 S. &c. who awarded, that the Defendant sh.uld pay to the Plaintiff at such a day 100 li. or should find two sufficient sureties to be bound with him to the Plaintiff to pay the said 100 li. to the Plaintiff, by twenty pounds a year, until the whole sum be paid; and pleaded further, that he had performed the said Award. The Plaintiff by Replication saith, that the Defendant hath not paid unto him the said one hundred pounds, and so in that assigned the breach of the Award, and upon the Replication the Defendant doth demurre in Law, because by the pretence of the Award, the Defendant had election either to pay the one hundred pounds at the day, or to find two sureties for the payment of it by twenty pounds per annum, &c. for so is the Award in the disjunctive. But the Court was clear of opinion, that the Replication was good, for although that the Award be set down and conceived in words disjunctive, yet in Law and in substance it is single, for as to the finding of Sureties the Award is void, and so nothing is awarded but the payment of the one hundred pounds at the day to which the Plaintiff in his Replication hath fully answered: And Judgement was given for the Plaintiff.

Hill. 30. Eliz. In the common Pleas.

C XCV. The Lord Dudley and Lacyes Case.

Audita que-
rela.

The Lord Dudley brought an Audita querela against Lacy, and upon it a Scire facias against the same party; And at the day it was moved by the Council of Lacy, that in as much as no execution was sued against the person of the Lord upon the Statute Staple, in which the said Lord was bounden to the

the said Lacy, so as he was not in prison, a Scire facias ought not to issue, but a Venire facias. And the Court was clear of opinion, That it is at the election of the party which of them he will sue, scil. a Scire facias, or a Venire facias. See 13 E 4. 5. by Coke, Scire facias and Venire facias are all one in effect: Another matter was moved of the part of Lacy; That this Audita Querela ought to be sued in the Chancery and not in the Common Pleas. But the Court was clear of opinion, that the party might sue in which of the Courts he would. See 16 Eliz. Dyer 332. An Audita Querela upon a Statute Merchant directed to the Justices of the Common Pleas; but upon a Statute Staple, the Suit shall be in the Chancery by Audit Querela directed to the Chancellor, or by Scire facias directed to the Sheriff, quod sit in Cancellaria, &c.

Hil. 30 Eliz. in the common Pleas.

CXCVI. Askewe and the Earle of Lincolnes Case.

Askewe was bound to the Earl of Lincoln in a Statute Staple, the Earl sued execution, by which Askewe was put in prison; and now the friends of Audita querela offered the money in Court, and cast an Audita querela for Askewe, and prayed he might be bailed, and the money remain in Court till the Audita querela determined. But the Earl presently demanded the money to be delivered to him, but the Court denied it, and commanded the Prelgnothories to keep the money, until the Audita querela were determined: And let Askewe to bail for the costs of suit.

Trin. 31 Eliz. in the Kings Bench.

CXCVII. Ward and Blunts Case.

Ward brought an Action of Trover and Conversion against Blunt of soj, twenty loads of Corn: as unto twenty loads the Defendant pleaded not guilty, and as to the residue a special plea, upon which the Plaintiff did demurre in Law, and it was adjudged for the Plaintiff, upon which issued a Writ of Enquiry of damages, which is returned: It was moved, that the Writ of Enquiry of Damages ought not to have issued forth, for the Issue doth yet depend untried, and the book of 34 H 6. 1. was bounched, and therfore the case was, that in Trespass against many, one of them made default after a plea pleaded. Now a Writ of Enquiry of Damages shall be awarded, but shall not issue forth until the plea of the others be tried, and if the Issue be tryed for the Plaintiff then the Enquest who tryed the Issue shall assesse damages for the whole, and if for the Defendant against the Plaintiff, then the Writ which was awarded to issue forth. See 44 E 3. 7. Cook, it is in the discretion of the Court, to award such Writ or not, which Wray granted, but it is usual here to grant the Writ presently: Gawdy, the case in 39 H 6. is not like this case, for in this case the Trespass is divided, and as it were apportioned in twenty loads, and twenty loads, but in the other case not.

Trover and
Conversion.

Trin. 31. Eliz. Rot. 666.

CXCVIII. Smith and Bustards Case.

In an Ejctione fitmæ it was found by special verdict, that one S was seised of Lands, and leased the same to F for one and thirty years, yeilding and paying.

ting.

ing twenty pounds per annum at the Font-stone in the Temple Church (the land it self lying in Essex) upon the Feasts of the Annunciation of our Lady and Saint Michael, or within twelve dænes after either of the said Feasts, by even portions, upon condition, that if the said Rent or any part thereof be unpaid by the said space of twelve dænes, Proxime post aliquod festorum vel diecum solutionis inde, that then it should be lawful for the Lessor to re-enter. T assigned his interest to Bustard the Defendant, at Michaelmas the Rent is behind, and the twelfth day after the Lessor demanded the Rent at the Temple Church; and for not payment thereof re-entered: Towse, the re-entry of the Lessor was not lawful, for by the said Reservation the Rent was not due until the twelfth day after Michaelmas, for before that he cannot have an Action of Debt, or distress for it, and these words (dierum solutionis) are greatly material, for conditions are odious in Law, and if the words thereof be doubtful, they shall be construed for the avail of him who is bound by it. As in the case of 28 H. 8. 17. If I be bound to you upon condition, to pay to you before the Feast of Saint Thomas twenty pounds, if there be in one year two Feasts of Saint Thomas, the latter Feast shall be my day of payment. Wray, this Rent is not due until the last day of the twelve dænes, for neither debt or distress lieth for it, then the day of payment mentioned in the condition ought to be the last day of the last twelve dænes, and dict. spatium shall be construed the same number of dænes, and not the same dænes. And at last it was resolved and adjudged, that the entry of the Lessor was not congeable, but he ought to expect the latter day of the twelve dænes.

Conditions
 expounded li-
 beraliter for the
 party who is
 to perform it.

Trin. 31. Eliz. in the Kings Bench.

C X C I X. Sir George Farmer and Brookes Case.

Prescription.

In an Action upon the Case the Plaintiff declared, that time out of mind, &c. there had been a Mannor called Toeester, and also there had been there a Town called Toeester, and that all the Possuages, Lands and Tenements within the said Town had been holden of the said Mannor, and that he is Lord of the said Mannor, and that he, and all those whose estate he hath in the said Mannor, have used to have a Wake-house, and a Baker, to bake white bread and house bread for all the Inhabitants and Passengers there, which bread hath been of a reasonable Assize and price, and sufficient for all the Inhabitants and Passengers there (but doth not say wholsome) and that time out of mind, &c. no person had had or used any Wake-house there, but by the appointment of the said Lord of the Mannor for the time being: But that now the Defendant had erected a Wake-house unto the Nusance of the Plaintiff: The Defendant shewed, that at the time he had set up his Wake-house there were three Bakers there; and shewed, how that he was Apprentice to the Trade, and that at the time, he set up the said Wake-house for the benefit of all persons, as it was lawful for him to do. Morgan, the matter only is, if this prescription made by the Plaintiff be good or not: It is to be considered, if all prescriptions at the Common Law are one, and if all prescriptions be guided by one rule and line: And I conceive, that prescription at the Common Law is but one: And there are two pointes in prescriptions, Usage and Reasonableness, but they are not guided by one line, for some prescriptions are against Strangers, and then there ought to be consideration and recompence: Some prescriptions against privies as between Lord and Tenant, for there the Tenure is sufficient, & volenti non fit injuria. For the first, see 5 H. 7. 9. where in Trespass the Defendant both justified, that the place where is his free-hold, and that he had a Foldage, and that he, and all those whose estate he hath, &c. have used, that if any man depasture his

his Sheep with the Sheep of the Defendant for the day time, that it was lame, fall at night to take all the Sheep and put them in his fold all the night, and in the morning to put them out; and the same was holden a good prescription, so which the Plaintiff traverfed the prescription: And for the other see 12 H 7. 13, 14. 21 H 7. 40. betwixt Lord and Tenant, that every Tenant for e. very pound-breach shold forfeit three pounds, and see the Prior of Dunstable's case, 11 H 6. 19. Sc. prescription 98. The Prior declared, that he and his Predecessors time out of mind, &c. had had a Market in D e'ery week one day, and that Butchers and others, who sold victuals, shold sell the same in the high street, upon stalls of the Prior to them assigned, and that the Prior shoulde have one penny for every stall every day; and shewed, that the Defendant had sold in his house, whereby the Prior had lost the advantage and profit of his stalls there. And the same was holden a good prescription. And on the other side, the Defendant did prescribe, that he and all house-holders of D had used to sell in their houses: The same was holden a naughty prescription. See 43 E 3. 5. and see also sicut ad molendum upon prescription without tenure, for peradventure he had not any Mill there before, and now it is an easie to the neighbours: Vide Register 105. where the mill is, Cum quenam habeat ratione Domini sui apud R calorem libertatem quod nullus in eadem villa uti debent seu confiever. Officio, sine Mysterio tractoris sine licencia ipsius querentis, the same is good by way of prescription, but is hold by way of grant. And there the Defendant is forbid to use the trade of his Dye-house within his Manors without his licence, which appeareth upon the Bill which is in the Register (which Register was made by the Judgement and advise of the great Judges of the Law) and there is remedy given for the like case, as in the case at the Warre. And see F B 122. b. Secundum ad furnam, and although such a manner of prescription shoulde bind a stranger, yet here our case is stronger, for the Defendant is our Tenant. And Hill 15. Eliz. Rot. 166. an express judgement was given in such case for the Plaintiff. Buckley contrary, although that here be a losse to the Plaintiff, yet there is not a wrong, as the case in 12 H 8. 3. If I have an acre of Land adjoyning to your acre, and my acre is drowned, I may make a sluice to carry away the water, and although that by so doing your acre is drowned, yet I shall not be punished for it, because it is lawful for me to make a trench in my own Land, and then if it be any Nusance to you, you may make a trench in your ground, and so carry away the water until it come to a River or ditch. See the case 11 H 4. of School-masters 200. for it is damnum absque injuria. And it is against the liberty of the Common wealth, that liberty of Contracts be not free but restrained with Priviledges to one only: Vide 22 H 6. 14. If one erect a Mill neer to my Hill, no Action lyeth against him, for it is for the use of the Kings Subjects, and God forbid, that Bread and the baking of it should be restrained to any special person, especially in a Market Town. And as to the case of the Prior of Dunstable, that is not to the purpose, for there he prescribed to have a Market and the correction of it; and the fault there is not in the usurping of a Market in Nusance of the Plaintiff, but cause the Defendant sold meat there secretly, so as the Plaintiff could not have the correction of it. See 22 H 6. 14. And it is not reasonable, that such profits be restrained and drawn from the publick good to the private commodity of any person. And he cited a case which was tried in the Exchequer 9 Eliz. upon an Information exhibited there by the Burgesses of Southampton, that the King had granted to the Burgesses of Southampton, that all the sweet Wines brought within the Realm shoulde be unladen at Southampton only: And it was agreed by the good Lord Wray, that such a grant was not good to deprive the Common wealth of such a ^{Grant of the} benefit, and to appropriate it to one, which might be profitable to many: And it King void. was further said by the Lord Wray, that if the King will grant by his Letters Patents, that A B shill be of council only with the Defendant in the Chan-

ctry, and C B with the Plaintiffs in the Exchequer Chamber, the same is no good grant, &c.

Trinit. 31. *Flax* in the Kings Bench. *Intrat.* Hill. 31. *Kor.* 31.

C.C. Park against Molle and How.

C.C. Park against Mosse and How.

Frover and Conversion.

¶ an Action upon the Case upon Trover and Conversion. The Defendant pleaded, that one A recovered in Debt against I P Executor of B P one hundred pounds and twenty pounds in Damages: The debt of the goods of the Testator, and the damages of the goods of the Testator, si quo fuerint, and if not, of the goods of the Executor. Upon which A procured a Fieri facias directed to the Sheriff of N who made his Warrant to the Defendants to execute the said Writ. And before Execution I P dyed intestate, and administration was committed to the Plaintiff, and the Defendants afterwards did execution of the proper goods of I P, and sold them, and deliver the money to the Sheriff, which is the same Trover and Conversion, and averred that E P had no other goods. The Plaintiff by Replication said, that the Sheriff upon the return of the said Writ of Execution, returned as to the principal debt, that the goods of the Testator were wasted; and as to the damages, that he could not execute the Writ quia cardo.

Tanfeld, I conceive that the false return of the Defendant shall not make the Defendant punishable, for they did execution, secundum exigentiam brevis, and delivered the moneys coming thereby to the Sheriff; and if they should not be excused it should be a great inconvenience, for it is necessary that the Sheriff have inferior Officers under him. As 37 H 6; an Execution named in the Will, named one to take the goods of the Testator in such a place, who did accordingly, and afterwards the Executor doth refuse; yet the servant shall not be punished for that meddling, 13 H 7. 2. 21 H 7. 23. Where it is said by Read theif Justice, that if the Wayly delivereth the body of one who he hath taken in Execution to the Sheriff, he shall be excused, although that the Sheriff doth not return the Capias; and we have pleaded in this case, that we have delivered the money to the Sheriff, and that is confessed by the demurrer. Alcham, I conceive that this Execution after the death of the party is not good. For an Administrator is another person, wherefore new process shall issue against him, as in all cases where the person is changed: 18 E 3. If one sueth a Certificate out of a Statute, and before execution had he dyeth, his Executors shall not have execution upon that Certificate, but first they ought to have a Scire facias: And 28 H 8. Dyer 29. Transcript of a Fine is removed by the Ancestor out of the Treasury into the Chancery, and comes in by Meticimus to have execution, and the Ancestor dyeth before Execution. Now the Heir cannot proceed without a new Meticimus, for he is another person. See 36 H 8. Br. Statute Merchant 43. and in our case here, at the time of the Execution these are not the goods of the Executor, for he is not in esse, and it ought to appear whose goods they are which are taken in Execution: If Lands be recovered against the Father who dyeth, and the Heir be ousted by Execution, without a Scire facias against the Heir, he shall have an Assize. And 6 E 6. Dyer 76. is our case. A is condemned in Debt, and a Fieri facias is awarded, and before execution A dyeth intestate: The Sheriff levied the Debt upon the goods of the Intestate in the hands of the Administrators; upon which the Administrators brought Error and reversed the Execution. Tanfeld, the Execution is erroneous, but is not void, but shall stand until it be reversed by Error. And it was holden by the whole Court, that the false return of the Sheriff should not prejudice the Defendants: At another day it was moved again, and it was holden, that the averment, that the goods put in
Execution

Execution

Execution were the goods of the Testator the day of the Writ of Execution a-
on sued, was a good abverment without laying, That the day of Execution done, soz against an Ad-
ministrator, the award of the Writ of Execution shall binde all his goods against whom after the
the Judgement was given which he had at the day of the Writ of Execution death of the
awarded. And it was also holden, That notwithstanding the death of the party Intestate of
against whom, &c. The Sheriff might do execution of the goods of the dead in the intestate
the hands of his Executors according to the opinion of Bryan. 16 H. 7. 6. goods; good
and afterwards in the principal Case Judgement was given against the Execution shal-
plaintiff. relate to the date of the Writ.

Trin. 31. Eliz. In the Kings Bench.

CC I. Carie and Denis Case.

The Case was; Upon a Laticet, the Sheriff returned, That by vertue of the said process he had arrested the Bodie of the Defendant, and that such a day after, and before the Return of the Laticet, a Habeas Corpus came to him to bring the bodie immediately into the Chancery, which was done accordingly, and there the Prisoner was discharged by the Order of the said Court: and the same was holden a good Return, for the Sheriff is bound to obey the Kings Writs, and to execute them, and he cannot compel the partie to put in Sureties to appear here: and the truth was, That the partie was brought before the Master of the Rolls, and he did discharge him. And per Curiam, the same is no offence in the Court, but it was an ill act of the Master of the Rolls. For we oftentimes have persons here upon Habeas Corpus who are also arrested by Process out of the Exchequer, or of the Common Pleas, but we will not discharge them before they have found Sureties for their appearance, &c. and so the said Courts use to do reciprocally: and we cannot punish the Sheriff, for the Habeas Corpus was first returnable before the Laticet, but the partie may have an action against the Sheriff, but we will speak with the Master of the Rolls, &c. and afterwards Bail was put in: But afterwards another Exception was taken to the Return: sci. a custodia nostra exoneratus tuus, which might be intended as to the Cause in the Chancery only, and not for the Cause here, for he hath not alledged, that he hath not alledged, That he was committed to any other in custodie, and for that cause day was given to the Sheriff to amend his Return.

Trin. 31. Eliz. In the Kings Bench.

CC II. Upton and Wells Case.

In an Ejectione firmæ by Upton against Wells, Judgement was given for the Plaintiff, and upon the habere facias possessionem, The Sheriff returned that in the Execution of the said Writ he took the Plaintiff with him, and came to the house recovered, and removed thereout a woman, and two children, which were all the persons which upon diligent search, he could finde in the said house, and delivered to the Plaintiff peaceable possession to his thinking, and afterwards departed, and immediately after three other persons which were secretly lodged in the said house expulsed the Plaintiff again: upon notice of which he returned again to the said house to put the Plaintiff in full possession, but the other did resist him, so as without perill of his life, and of them that were with him in company he could not do it. And upon this Return the Court awarded a new Writ of execution, for that the same was no Execution, of the first Writ, and also awarded an attachment against the parties.

Trin. 31. Eliz. In the Kings Bench.

CC III. Marsh and Astreys Case.

Tryall.

Marsh brought an Action upon the Case against Astrey, and declared, That he had procured a Writ of Entry for disseisin against one A. and theretupon had a summons for Lands in London, and delivered the said Summons to Astrey being under Sheriff of the same County; virtute ejus, the said Astrey summoned the said A. upon the Land, but notwithstanding that did not return the said Summons; Astrey pleaded Not guilty. And it was tryed in London, where the action was brought for the Plaintiff, and it was moved by Cook in arrest of Judgement, That here is a mis-trial, for this is sue ought to be tryed in the County where the Land is, because that the cause is local; but the Exception was not allowed, for the action is well layed in London, and so the trial there also is good. Another Exception was moved because the action ought to be against the Sheriff himself, and not against the Under Sheriff, for the Sheriff is the Officer to the Court, and all Returns are in his Name, and I grant that an action for any falsity or deceit lyeth against the Under Sheriff, as for embesetting, raising of Writs, &c. but upon Non sequans, as the Case is here, the not Return of the Summons, it ought to be brought against the Sheriff himself. See 41 Ed. 3. 12. And if the Under Sheriff take one in Execution, and sufferereth him to escape debt lyeth against the Sheriff himself. Another Exception was taken because the Declaration is that the said Astrey Intendens & machinans ipsum querent, in actione sua predict. prosequend. impedit, &c. did not return the said Summons but doth not say, tunc exist. Under Sheriff. Nag, contrary, If a Bayly Errant of the Sheriff, take one in Execution, and he suffer him to escape, an action lieth against the Bayly himself. And that was agreed in the Case, of a Bayly of Middlesex, and Sir Richard Dyer Sheriff of Huntington, and his Under Sheriff, who suffered a Prisoner to escape, and the action was brought against the Under Sheriff; for it may be the Sheriff himself had not notice of the matter, because the Writ was delivered to the Under Sheriff, and he took a Fee for it, and therefore it is reason that he shall be punished. As if a Clerk in an Office mis-enter any thing, he himself shall be punished, and not the Master of the Office, because he takes a fee for it. But if the Return made by the Bayly be insufficient, Then the Sheriff himself shall be amerced, but in the principal case it is clear, That the action lyeth against the Under Sheriff if the party will, and such was the opinion of Gawdy and Clench: As to the other matter, because it is not alledged in the Declaration, That the Defendant was under Sheriff at the time, The Declaration is good enough notwithstanding that, for so are all the Presidents, and if the Defendant were not under Sheriff the same shall come in of the other side. See 21 E. 4. 23. And afterwards in the principal Case, Judgement was given for the Plaintiff.

Trin. 31. Eliz. In the Common Pleas.

CC IV. Hedd and Chaloners Case.

Hed an Ejectione sime by Hedd against Chaloner upon a Demise for years of Jane Berd, It was found by especial Verdict, That William Berd was seised in Fee, & made a feoffment to the use of himself for life, and afterwards to the use of his two daughters Joan and Alice in fee, and dyed, and Joan entred

tres into the Land, and by Indenture by the name of Jane Berd, leased the same to the Plaintiff for three years. And it was further found, That Joan intended in the Settlement, and Jane who leased, are one and the same person; Wray, It hath been agreed here upon good advice and Conference with Grammarians, that Joan and Jane are but one Name. And Women because (Joan) seems to them a homely name, would not be called Joan but Jane: But admit that they were several Names, Then he and Gawdy were of opinion, it should not be good: But afterwards, it was said by Gawdy, That this action is not grounded merely upon the Indenture, but upon the Demise, and that is the substance, and the Indenture is but to enforce it, sci. the lease, 44 E. 3. 42. Another matter was moved here, the remainder was limited to Joan and Alice in fee, by which they are Joint Tenants, and then when one of them enters, the same begets the possession in them both; Then by the demise of Joan a moety passeth only to the Plaintiff. Wray, Here the Term is incurred, and the Plaintiff is to recover damages only, and no title at all is found for the Defendant, and so there is no cause but that Judgement should be given for the Plaintiff: and thenceupon Judgement was given for the Plaintiff.

Trin. 31. Eliz. In the King's Bench.

CC V. Read and Nash's Case.

In an action of Trespass by Read and his wife against Nash, for entering into a house called the Dayry-house, upon Not guilty pleaded, The Jury found this special matter, Sir Richard Gresham Knight, was Seised in fee of the Mannours of J and S and of diverse other Lands mentioned in his Will, and 3 Edw. 6. devised the same to Sir Thomas Gresham his Son for life, the Remainder to the first son of the said Sir Thomas Gresham in tail, the Remainder to the second son, &c, the Remainder to the third son, &c. The Remainder to Sir John Gresham his brother; Proviso, That if his Son go about or make any Alienations or discontinuance, &c. whereby the premises cannot remain, descend and come, in the form as was appointed by the said Will, otherwise then for Joyntures for any of their Lives for her life only or leases for 21. years, whereupon the old and accustomed Rent shall be reserved, That then such person shall forfeit his estate, Sir John Gresham dyed: Sir Thomas Gresham his son, built a new House upon the Land: and, 4 Mariz. leased to Bellingford for one and twenty years, remyng the ancient Rent. And afterwards 2 Eliz. he leavyed a fine of the said Mannours and of all his Lands: and 5 Eliz. he made a Joynture to his wife in this manner, sci. He covenanted with certain persons to stand seised to the use of himself, and his wife for their lives, and afterwards to the use of his Right Heirs, and afterwards, 18. Eliz. he leased unto Read and his wife for one and twentie years to begin presently (which was a year before the expiration of the said Lease made unto Bellingford;) which Lease being expired, Read entered. It was argued by Cook, That hereupon the words contained in the Proviso, Sir Thomas had power and authority, not being but Tenant for life to make a Lease for years, or Joynture, and that upon implication of the Will, which ought to be taken and construed according to the intent of the parties; for his meaning was to give a power, as well as an estate, otherwise the word (otherwise) should be void; and it is to be observed, That the parties interested in the said conveyance were Knights, and it is not very likely, That the said Sir Richard Gresham did intend, that they shold keep the Lands in their own manurance as Husbandmen, but let the same to Farm for Kent. And it is great Reason, although he willed

that the order of his Inheritance should be preserved, yet to make a Prohibition for Jointure; and it is great reason and cause to his family to enable and make them capable of great Matches, which should be a Strengthening to his posterity, which could not be without great Jointures, wherefore I do conceive it reasonable to construe it so, That here they have power to make jointures for their Wives. It hath been said, That no grant can be taken by Implication, as 12 E. 3. s. avod. 77. Land was given to I and A his wife, and to the heirs of the body of I begotten: and if I and A dy, without heir of their bodies, betwixt them begotten, that then it remain to the right heirs of I; and it was holden that the second clause, did not give an estate tail to the wife, by implication being in a grant, but otherwise it is in Case of a devise, as 13 H. 7. 17. (and there is no difference (as some conceive) when the devise is to the heir, and when to a stranger) but these cases concern matter of Interest, but our case concerns an Authority: and admit that Sir Thomas hath power and authority to make this lease, Then we are to consider if the Jointure be good, for if it be, Then being made before the Lease, & shall take effect before, and the woman Jointurie is found to be alive. But I conceive, That this Jointure is void, and then the Lease shall stand, for an use cannot rise out of a power, but may rise out of an estate of the Testa, for, and out of his Will, 19. H. 6. A man devileth, That his Executors shall sell his reversion, and theyself by Word, it is a good Sale, for now the Reversion passeth by the Will. But an use cannot be raised out of an use, and a man cannot bargain, and sell Land to another use then of the Bargainer. And it is like unto the case of 10 E. 4. 5. The disselee doth release unto the disselee rendering Kent, the render is void, for a rent cannot issue out of a right, so an use cannot be out of a Release by the disselee, for such release to such purpose shall not ensue as an Entry and Feoffment: Also here after that conveyance. Sir Thomas hath built and erected a New house, and no new Rent is reserved upon it, & therefore here it is not the ancient Rent, for part of the sum is going out of the new house. But as to that, It was laid by the Justices, do not speak to that, for it appears that the Rent is well enough reserved. Another matter was moved for that, That a year before the Expiration of the Lease made to Billington this Lease was made to Read, for 21. years to begin presently from the date of it; although by the same authority he cannot make Leases in Reversion, for then he might charge the Inheritance in infinitum. But yet such a Lease as here is he might make well enough, for this Lease is to begin presently, and so no charge to him in the Reversion, as in the Case, betwixt Fox and Colliers, upon the Statute of 1 Eliz. A Bishop makes a Lease for three years before the Expiration of a former Lease to begin presently, It was holden a good Lease to bind the Successor for the Inheritance of the Bishop is not charged above one and twenty years in toto. But if a Bishop make a Lease for years, and afterwards makes a Lease for three lives, the same is not good, 8 Eliz. Dy. 246. Tenant in tail lealeth to begin at Michaelmas, next ensuing for twenty years, it is a good Lease by the Statute of 32 H. 8. so is a lease for 10 years, and after for eleven years, and yet the Statutes are in the Negative, but this power in our Case is in the Affirmative; and the Inheritance is not charged in the Whole with more then one and twenty years.

Trinit. 3 1. Eliz. In the Kings Bench.

C C V I. Kinnersly and Smarts Case.

Debt upon a usurious Con-
tract.

In Debt upon a Bond, The plaintiff declared, That the Bond was made in London; The Defendant pleaded, That an usurious Contract was made

made between the parties at D in Stafford-shire, and that the Obligation was made for the same contract. The Plaintiff by Replication saith, that the Bond was made bona fide, & non pro usura, and that Issue was tried in the County of Stafford, and was found for the Plaintiff: And it was moved in arrest of Judgment, that that Issue ought to be tried in London, where the contract was made. Gaudy conceived, that the trial is well. As 3 E 3. In debt upon an Obligation in London, the Defendant pleaded, that the Obligation was made by duress at York, the same Issue shall be tried at York. At another day the case was put more certain, sait, that the contract was made at W in Stafford-shire, by which it was agreed, that for a Hopspe and two Tuns of Iron, the Plaintiff should have for them and the forbearing of the money for such a small time fifty pounds; whereas in truth they were but of the value of forty pounds, and that the said Bond was made for the payment of the said fifty pounds. Cook, Tryal, the Issue is well tried, for the ground of the matter is the usurious contract, and those of Stafford-shire may better know it than they of London. And according to this Tryal it hath been before adjudged. H. 28. Eliz. rot. 209. Between Sybthorpe and Turner. And P 31. Eliz. rot. 303; between Payne and Wilkenson, where the Issue was, absque hoc, that it was a corrupt agreement, but the pleading was, ut supra. And afterwards Judgement was given for the Plaintiff.

Trin. 36. Eliz. in the Kings Bench.

CCVII. The Queen and Buckberds Case.

The Queen recovered against Buckbeard in a Quare Impedit; and thereupon a writ of Error was brought, and it was assigned for Error, that the Queen, post tempus semestre, had Judgement to recover damages for the value of the Church of half a year: Cook, the same is no Error as it was adjudged, 7 Eliz. 236. See also 34 H. 1. 51. And these damages are not as damages, but as a penalty inflicted upon the disturbance. See Book Entries, 483. The King in a Quare Impedit counted to his damage of forty pounds, and 484, 600 li. and although tempus semestre transferit, yet the King shall recover damages, but the value of the Church for half a year, for the King at all times may present in his own right, for nullum tempus occurrit Regi. At another day it was moved by Fennet Serjeant, and he conceived, that here the Queen is not to recover damages, for he doth not present in her own right, for the Incumbent had two Benefices without Qualifications, and therefore the first was void, and the Lapse incurred, and therefore the Queen did present in the right of the Crown, and so is not verus Patronus. 14 E 3. Quare Impedit 54. The King shall not recover damages, although he count of damages, 3 H 6. Damages 17. And as to the case of 7 Eliz. it doth not appear there, that the King did present by reason of his Prerogative, and he sheweth divers Presidents, that the King shall not recover damages in such case. P 7 H 3. rot. 402. 2 H 6. rot. 210. For the Statute was intended to give damages to the very Patron, and not otherwise. Cook, where the King presents by Lapse he is verus Patronus hac vice, as Counter of the next Aduocance: Vnde T. E 1. Quare Impedit 181. The King recovered damages in the case of a Prior. Godfrey said, he had searched the Roll of 7 Eliz. and there is more reported in the Book then is in the Roll, for Judgement is given for the Presentee, but as for the damages, the Court would advise of it. Gaudy, it is clear, that the Queen shall not recover double damages, for she cannot leave her presentation, quia nullum tempus occurrit, and because, eo single damage quod tempus semestre transferit, but she shall have single damages, for they are given.

given for the wrong and disturbance, and not for the presentment; and therefore the damages are well awarded. Wray, If the King be not within one part of the Statute, (as it is agreed as to the double damages) it is hard that he be within the other branch.

Popham Attorney general, The Queen ought to recover damages, but only single damages, but not double damages, and the words of the Statute are general, therefore the Queen shall have the benefit of it, and of all Statutes made for the benefit of the Subjects, the King shall take advantage: The Statute of Gloucester gives damages in a Writ of Cosinage, Aiel, and Besail, and the King by his an Action upon the leisin of his Ancestors, he shall recover damages, and in construction of Statutes, the opinions of them which were next to the making of them is to be much respected: Vide 19 E 2. rot. 90, 19 E 2. rot. 235, 23 I. 136. And always the King counts to his damage, &c. and that should be in vain, if he should not recover damages: And as to the Presidents shewed to the contrary, that was the default of those Clerks which the King had presented, and when in a Quare Impedit the King had prevailed, they contented themselves with the Incumbency without regard of the damages: But if damages be not to be given, yet the Judgement to recover the presentment is not erroneous. And the Judgement only as to the giving of damages shall be reversed, and the Defendant in the Quare Impedit here shall not assign the same for Error, because no damages are given, for it is for his advantage. And always where it is found for the Queen in a Quare Impedit, they enquire of the value of the Church, which should be a trifolous thing, if the Queen should not recover damages. Gawdy, of things transitories the Queen may be disturbed, and if she be, wherefore shall she not recover damages? but the doubt is, if the intent of the Statute be, if the party shall have single damages in any case: And here in this case the Judgement is one and entire, and if it be reversed in part it shall be reversed in the whole; as in Dower, the Tenant pleads, that he is always ready, &c. the Demandant shall have Judgement to recover her Dower, and a Writ shall issue forth to enquire of the damages. And see also 17 E 3. In an Assize of Dower presentment, the Plaintiff had Judgement to have a Writ to the Bishop: And the Assize was taken after for the damages: And in the mean time the Defendant brought a Writ of Error, and it was holden maintainable, for they are several Judgements; but it is not so here, for the Entry is, Quod querens habeat bre. Episcopo, & quia nescitur quia damna, &c. for it is one Judgement.

Wray, It is but one Statute, and therefore it shall be construed with one construction, and it should be a strange construction, that the King should be within one part of the Statute, and out of the other. And 34 H 6. 3. The Kings Attorney could not have damages, which is a great proof and authority, that the Judgement for damages in such case is Error: The experience and usage of Law is sufficient to interpret the same to us, and from the time of E 3. until now, no damages have been given in such case. Thrice this matter hath been in question, i. 3 H 9. and the Justices there would not give damages; 34 H 6., there the Council learned of the King, could not have damages for the King. And 7 Eliz. there was no damages: And whereas it hath been said, that a man shall not have a Writ of Error, where Judgement is given for his benefit, that if Judgement be entered that the Defendant be in Mancr. where it ought to be, Capiatur, yet the Defendant shall have a Writ of Error: And he conceived also, that here is but one Judgement: Clench, the first President after the making of that Statute was, that damages were given for the King in such case; but afterwards the practice was always otherwise, and that the said Statute could not be construed, to give in such case damages, and the reason was because the Justices took the Law to be otherwise: And the King is not within the Statute of 32 H 8. of buying of Tythes, nor any Subjects

Subjects who buyeth any title of him : And here in our case , the Queen is not verus Patronus, but hath this presentment by Prerogative : And if title do accrue to the Bishop to present for Lapse , yet the Patron is verus Patronus.

At another day the case was moved, and it was said by Wray, that he had conferred with Anderson, Manwood, and Periam, who held, that the Queen could not have damages in this case , but Periam somewhat doubted of it. Gawdy, in 12 E 4. 46. In Dover the Demandant recovered her Power , and damages by verdict , and afterwards for the damages the Judgement was reversed, and stood for the Lands. Clench , it shall be reverled for all, for there is but one Judgement. Any afterwards Judgement was given , and that the Queen should have a Writ to the Bishop and damages. Popham, The Court ought not to proceed to the examination of the Errors , without a Petition to the Queen, and that was the case of one Mordaunt, where an Infant leyd a fine to the Queen, and thereupon brought a Writ of Error, and afterwards by the Resolution of all the Judges, the proceedings thereupon were stayed. See 10 H 4. 148. a good case.

Trin. 31. Eliz. in the Kings Bench.

C C V I I I. Chapman and Hurst's Case.

BETWIXT Chapman and Hurst the Defendant did libell in the spiritual Court , for Tythes against the Plaintiff , who came and affirmed , that whereas he held certain Lands by the lease of Sir Ralph Sadler for term of yeares within such a Parish , that the now Defendant being Farmer of the Rectory there : The Defendant, in consideration that the Plaintiff promised and agreed to pay to the Defendant ten pounds per annum , during the Term, for his Tythes , he promised , that the Plaintiff should hold his said Land without Tythes , and without any fine for the same, and thereupon prayed a Prohibition : And by Gawdy ; the same is a good discharge of the Tythes for the time , and a good Composition to have a Prohibition upon ; and and it is not like unto a Covenant. See 8 E 4. 14. by Danby.

Trin. 31. Eliz. in the Common Pleas.

C C I X. Kirdler and Leversage's Case.

IN A bovwy the case was , that A seised of Lands leased the same at Will , Avowry. Tredyng rent ten pounds per annum, and afterwards granted eundem redditum , by another deed to a stranger for life , and afterwards the lease at will is determined. Periam was of opinion, that the Rent did continue, and also though that the words he, eundem redditum, yet it is not to be intended, eundem numero, sed eundem specie , so as he shall habe such a Rent, scil. ten pounds per annum : As where the King grants to such a Town , easdem libertates quas Civitas Chester habet, it shall be intended such Liberties, and not the same Liberties, so in the principal case : Also he held, that a Rent at will cannot be granted for life , and therefore it shall not be meant the same Rent : But it was afterwards adjudged , that the Rent was well granted for the life of the Grantee.

Trin. 31. Eliz. In the Common Pleas.

C C X. Heayes and Alleyns Case.

Heayes brought a *sur cui in vita* against Alleyn. And the case was this, *The Discontinuere of a Messuage, had other Lands of good and indefensable tytle adjoining to it, and demolish and abated the said house, and built another which was larger, so as part of it extended upon his own Land, to which he had good title.* And afterwards the heir brought a *sur cui in vita*, and demanded the house by the Name of a Messuage, whereas part of the house did extend into the Land to which he had no right. And by Periam, *The Writ ought to be of a Messuage with an Exception of so much of the house which was erected upon the soyl of the Tenant, as demand of a Messuage except a Demand, and Chamber:* And it was argued by Yelverton, *That the Writ ought to be in the manner of bate, for if the Demandant shall have Judgement according to his Writ, in a writ, then it shall be entred quod petens recuperet Messuagium, which shoud be Errorious, for it appeareth by the verdict it self, that the demandant hath not title to part of it; and therefore he ought to have demanded it specially,* 5 H. 7. 9. parcel of Land, containing 10. Feet. 16 E. 3. Br. Mortdanc. of a piece of Land containing so much in breadth, and so much in length. And the moyetic of two parts of a Messuage, and 33 E. 3. br. Entrie 8. a disseisor of a Parsh ground made Meadow of it. Now in a Writ of Entry it shall be demanded for Meadow. True Servient contrary, and he confessed the Cases put before, and that every thing shall be demanded by Writ in such sort, as it is at the time of the action brought: as a Writ of Power is brought of two Hills, whereas during the Cobertura they were but 2 Lots; but at the day of the Writ brought, Hills; and therefore shall be demanded by the name of Hills, 14 H. 4. 33. Dower 21. 13 H. 4. 33. 175. 1 H. 5. 11. Walmesly, part of a Messuage may be demanded by the Name of a Messuage: and if a House descend to two Coparceners, if they make partition that one of them shall have the upper Chamber, and the other the lower, here if they be disseised, they shall have several Assises, and each of them shall make his plaint of a Messuage, and by him a Chamber may be demanded by the name of a house. And afterwards the Writ was awarded good but a special Judgement was given ei, quod querens recuperet Messuagium predict. viz. so many feet in length, and so many in breadth, according to that which was found by the Verdict.

Trin. 31. Eliz. in the Common Pleas:

C C XI. Degory and Roes Case.

Debt.

Degory brought Debt upon an Obligation against Roe, as heir to his Ancestoz. The defendant pleaded, *That his Ancestor by his deed did covenant with Sir W. Winter, and A. Marsh, to stand seised to the use of himself for life, and afterwards to the use of the Defendant, and his heirs, and so he had nothing by descent.* The Plaintiff replicando said, non convenit; and it was found by special verdict, *That such a deed of Covenant was made by the Ancestor of the Defendant, but the first use was limited to the Covenanter and his wife, for their Lives, &c. And that he delivered the same to J S as his deed, to the use of the said Sir W. Winter, and the said Marsh, if the said Sir W. Winter would agree to the same, and take the charge of it upon him, and if he will not agree, That then it should not be his deed, and further*

further found, That Sir W. Winter dyed before any agreement, and it was moved by Periam, If the same be presently the deed of the Ancestoz, or if it do not take effect till the condition be performed, sci. untill Sir W. Winter hath agreed to it. See 14 H. 8. 17, 18, 19, 20, 23. And by Walmelly. The Deeds, when same is not the Deed of the Ancestoz, until Sir William hath agreed; But to take effect, by Anderson and Periam, although Sir William Winter doth not agree to it, Yet it is the deed of Roe, forz although a deed be upon condition, ut supra, yet because he delivered it as his deed, and the Condition is subsequent to it, It shall be taken for his deed, and the condition after shall be void, because repugnant: Forz although that in Estates limited to men, the estate may be precedent, and the condition subsequent, and the non performance of the condition may destroy the estate, for the estate is alwaies subject to the condition, yet it is not so in Deeds, forz being once the deed of the party, it can never cease to be his deed, after it is once delivered as his deed. Owen, Although the same be the deed of the party, yet it is not well pleaded, and he conceived the issue is sound against him, for the Covenant is pleaded, to stand seised unto the use of himself for life, the Remainder over: To which the Plaintiff Replicando saith, non convenit, so as the Issue is, if any such Deed of Covenant was, and the Jury find, That the Covenant was to stand seised to the use of himself, and his wife, &c. so as it is not such a deed as the Defendant hath pleaded, forz other estates are limited by it, and therefore it shall not be intended the same deed. Periam, The same is not materiall, forz the substance of the Plea is, Nothing by dissent, &c. and it was ad-journed.

Term 31. Eliz. In the common Pleas.

CCXII. The Schollars of All-souls in Oxford, and Tam-worths Case.

¶ A Writ of Right by the Colledge of All-souls in Oxford against Tamworth: the Writ was, Quod clamat tenere de nobis in liberam puram et perpetuam Elemosinam. And exception was taken to it, because it ought to be in liberam Eleemosinam, sans pura & perpetua, also it ought to be Eleemosina, with a Double e, and not Elemosina, with a single e, but the exception was not allowed. Forz as to the first Exception, it is but surplusage, and as to the other, It is the common course. Another exception was taken to the Writ, because the words are quod clamat esse jus & haeredicatem suam, without saying in jure Collegii: Anderlon, The Writ is good enough. If a Parson plead that he is seised, he shall say in jure Ecclesie, forz he hath two capacities, and without such words here shall be intended seised in his own Right, But if an Abbot plead that he was seised, there needs not such words for he hath no other capacity, so of Dean and Chapter; Mayor and Commonalty; And afterwards, the Writ was awarded good, and that the Tenant should answer over, &c. See Book Entries 236, 237 It was also moved, If the Colledge shall count of its seisin within 30. years, because that the Corporation never dyes, and then if he count of its own possession, the same is without limitation. And it was holden, that if the Guardian of the Colledge which now is, was ever seised, he ought to count upon a seisin within thirty years; But upon the seisin of his Predecessor, he ought to count of a seisin within 60 years as another common person, for the change of the Teste of such a seisin, is as the dying seised, and dissent of a common person.

{ The Lord Buckhurst and the Jennings and Hawkins and
 { Bishop of Winchesters Case. { Winches Case. { Lawse Case.

Trinit. 31. Eliz. in Communi Banco.

C C X I I I. *The Lord Buckhurst and the Bishop of Winchesters Case.*

QuareImpedit.

The Lord Buckhurst brought a Quare Impedit against the Bishop of Winc. and counted, that he was seised of the Manors of D, to which the Abbouson was appendant, and that the said Church became void, and that he presented Maurice Sackville his Clark. The Defendant pleaded, that he was seised of the said Abbouson, as in gross, and presented one Maurice Sacvill, absque hoc, that the Abbouson was appendant. It was moved, that the Defendant ought to traverse the Presentment, and not the Appendancy, especially as the cause is here, where they both present one and the same person, to which it was said, that that doth not appear, for the Defendant hath pleaded, that he presented Maurice Sackville, but doth not say, predict. Maurice Sackville, so as it may be he is not the same person, but another. See 10 H 7. 27. the Traverse is well taken contrary, where the Plaintiff declares of an Abbouson in gross, and that he to the same presented, and the Defendant pleadeth, that he is seised of such a Manor to which the Abbouson is appendant, &c. without that, that the Abbouson is in gross, there he shall traversed the presentment, for the presentment shall make it in gross. See 13 H 8. 12.

Trin. 32. Eliz. in the Common Pleas.

C C X I V. *Jennings and Winches Case.*

Assumpst.

In an Action upon the Case by Jennings against Winch. The Plaintiff declared upon an Assumpst by the Defendant, 1. Maii 32. Eliz. and counted upon a Mutuatus for twenty Millings, and an Indebitatus for four pounds. The Defendant pleaded, that he being indebted to the Plaintiff in five pounds, and W S in another five pounds, they became bounden to the Plaintiff in twenty pounds for the payment of ten pounds in satisfaction of the said sum of five pounds, and five pounds, and that the Obligation was sealed before the day of the Assumpst supposed, and added, that the same is the same debt, and that the Obligation was made for the same debt. And by the opinion of the whole Court, the same cannot be a good plea, for an Obligation cannot retain a Contract or an Assumpst afterwards made. And the truth of the matter was, that the Obligation was made after the Assumpst, although that the Plaintiff declared of an Assumpst made after. And in that case it was holden, that the Defendant might plead the special matter; that the Obligation was made after the said Assumpst, absque hoc, that he Assumpst, &c.

Trin. 32. Eliz. In the common Pleas.

C C X V. *Hawkins and Lawse Case.*

Debt.

Hawkins brought an Action of Debt against Lawse, Executor of one A, for Kent reserved upon a Lease for years made to the Testator. The Defendant pleaded, fully administered, and upon the Evidence it appeared, that the said A made the Defendant his Executor, and that he did meddle with the possession

possession of divers goods of the Testator, and so administered, and afterwards resuled in Court; and that the Administration was afterwards committed to one B, and that the Inventory of the goods of the Testator came to one thousand pounds: And it was given in Evidence for the Defendant, that he himself had paid certain debts, and that divers persons have recovered against the Administratoz divers sums of money amounting to one thousand pounds, & ultra; And it was moved, if that evidence did maintain the Issue for the Defendant, because that the Defendant had pleaded plene administravit, which implies an Administration by himself. And now upon the Evidence it appeareth, that the greatest part of the goods of the Testator were administered by the Administratoz.

Periam, If that Administratoz (who in truth is but a stranger) pay any debts with the goods of the Testator without commandment of the Executoz, the same is not an Administration, and the Executoz cannot give such matter in Evidence, to prove his plea of fully administered. Drew Serjeant, If an Administratoz of his own wrong, meddle with the goods of the Testator, and afterwards the Administratoz meddle with the residue and administer them: In Debt against the Executoz, who pleads fully administered, if he can prove that he himself hath administered part, and the Administratoz the Residue, the same is good Evidence to maintain his Issue. Periam, It may be so there, but here in our case, the Defendant is the very Executoz, and he hath administered, in which case afterwards he cannot refuse; and so the Administration is not well committed, and is granted without cause; and he to whom the Administration is committed is a mere stranger, and what he did was without warrant; and therefore it is no Administration to prove the Issue: And then the whole matter by direction of the Court was found by special verdict: And by Periam, in this case an Action may be brought, either against the Executoz of his own wrong, or the Administratoz, but not against both of them jointly. See 21 H 6. 8. by Yelverton and Portington: Periam, If the Testator mortgages a Lease for yeares and dyes; and the Executoz redeem it with their own monies, the said Lease shall be Assets in their hands, so much as the same is worth, above the sum which they have paid for the redemption of it.

Trin. 32 Eliz. in the Common Pleas.

C C X V I. Ivory and Fryes Case.

It was ruled by the whole Court in this case: That if A make B his Executoz, and B makes C his Executoz and dieth, and a Debt is due to A the first Testator. If C bring an Action of Debt for the said debt, as Executoz to B, the Suit shall abate: It was moved, if an Infant within the age of one and twenty years makes his Executoz, & administration is committed, durante minore aetate, in whose name the Action shall be brought, in the name of the Infant, or the Administratoz. Periam, If he will be proved before the Administration be committed, the Action shall be brought in the name of the Infant Executoz.

Tirnit. 32. Eliz. In the Common Pleas.

C C X V I I. Reade and Johnsons Case.

It is an Action upon the Case betwixt Read and Johnson, the Plaintiff declared that where the Defendant was indebted to him, he assumed to pay it: And Assumpsit.

upon Non Assumpsit pleaded, this special matter was found, that the Plaintiff leased unto the Defendant certain Lands for yeares, rendering rent eight pounds per annum, and that the said Rent was behind for three yeares, and that the Defendant was not otherwise enfeoffed to the Plaintiff, nor made any other promise but the contract upon the Reservation of the Rent: And by the clear opinion of the whole Court, the Action doth not lye, because he hath a proper Action, scil. an Action of Debt, in which no wager of Law lyeth.

Trin. 32. Eliz. in the Common Pleas.

CC XVIII. Wright and the Bishop of Norwiches Case.

Quare impec-
dit.
In a Quare Impedit betwixt Wright and the Bishop of Norwich, it was imputed, if the King hath title to present for Lapse, and presents; and his Clerk is admitted and instituted, but not inducited, and dyeth before Induction. It now the King shall present for the said Lapse, because the Church was not full against the King. And the Justices were all clear of opinion, that the King might repeal such presentation before induction, and as to the principal matter, the Court seemed to incline, that the King might present again.

**Mich. 30. and 31. Eliz. In the Common Pleas. *Intra.* Trin.
 30. Eliz. Rot. 1160.**

CC XIX. Whiskon and Cleytons Case.

Devisers.

In an Ejectione firmæ, upon a special verdict found, the case was this. That C was seised in Fee, and devised the same to Solomon Whisker his Godson after the death of his wife; and if he fail, then he willed all his part to the discretion of his Father, and dyed; Solomon survived, the Father being dead before without any disposition of the Land. Gawdy was of opinion, that upon those words, that the Father had a Fee simple, as, I will that my Lands shall be at the disposition of I S, by these words, I S hath a Fee simple, quod Periam concessit; and they amount to as much as, I will my Land to I S to give and sell at his pleasure: And by Windham and Periam, there is no difference where the Devise is, that I S shall do with the Land at his discretion, and the devise thereof to I S to do with it at his discretion.

CC X X. Mich. 31. Eliz. in the Common Pleas.

A leased to B for yeares, and before the expiration of the said Term leased the same by Indenture to a stranger to begin presently, and the first Lessee committed Waste. A brought an Action of Waste against the second Lessee, and declared upon a Lease made for yeares without speaking of the Indenture. And Gawdy Serjeant demanded the opinion of the Court, if the Defendant might safely plead no Waste? And they conceived, that it should be dangerous so to do. Then it was demanded, if the Defendant plead, that the Plaintiff had nothing, tempore dimissionis, whereof he had counted, if the Plaintiff might estop the Defendant by the Indenture, although he had not counted upon it, and if such Replication be not a departure. And it seemed to Periam, and Leonard, Custos brevium, that it was not, for it is not contrary to the Declaration, but rather doth enforce the Declaration.

Mich.

CCXXI. Mich. 31. Eliz. in the Common Pleas:

W^m Almesley Servant demanded the opinion of the Court upon this matter. Land is given to Husband and Wife in special tail (during the Coverture) they have issue, the Husband is attainted of Treason and dyeth, the Wife continues in as Tenant in tail, the issue is restored by Parliament, and made inheritable to his Father, saving unto the King all advantages which were devolved unto him by the Attainder of his Father, the Wife dyeth. And he conceived, that the issue was inheritable, for the Attainder which disturbed the inheritance is removed, and the blood is restored, and nothing can accrue to the King, for the Father had not any estate forfeitable, but all the estate did survive to the Wife, not impeachable by the said Attainder. And when the Wife dyeth, then is the Issue capable to inherit the estate tail. Windham and Rhodes, *prima facie*, thought the contrary, yet they agreed, that if the Wife had suffered a common Recovery, the same had bound the King.

CCXXII. Mich. 31. Eliz. in the common Pleas.

In an Action upon the Case the Plaintiff declared, that he had delivered to the Defendant, diversa bona ad valentiam 10 li. the Defendant in consideration thereof did promise to pay to the Plaintiff the debt owing, pro bonis predictis, and did not shew, that the Defendant bought the said goods of the Plaintiff, and so it doth not appear that there was any debt; and then a promise to pay it, is merely void, which was agreed by the whole Court.

Mich. 31. Eliz. in the common Pleas.

CCXXIII. Seaman and Brownings Case.

George Seaman brought Debt upon a Bond against W Browning and Gothers, Executors of one Marshal; the condition was, that where the said Marshal had sold certain Lands to the Plaintiff, if the said Plaintiff peaceably and quietly enjoy the said Lands against the said Marshal, &c. and assigned the breach in this, that the said Marshal had entered upon him, and cut down five Elmes there, upon which the parties were at issue; And it was found, that A, servant of the said Marshal, by commandment of his said Master, had entered and cut, &c. in the presence of his said Master, and by his commandment, for he is a principal Trespassor; And it was so holden by the Court.

CCXXIV. Mich 31. Eliz. in the common Pleas.

If the Kings Tenant by Knights service dyeth, his Heir within age, and upon Office found the King seileth the body and Land, yet the Heir during the possession of the King may sell the Lands by Deed enrolled, or make a Lease of such Land, and the same shall bind the Heir notwithstanding the possession of the King; but if he maketh a Feoffment in Fee, it is utterly void, for the same is an intrusion upon the possession of the King; but where the King by Office found is entitled to the Inheritance, as that his Tenant dyeth without Heir, whereas it is false, for which the King seileth, in such case the Tenant of the King, before his Ouster le mayne, cannot make a Lease for years,

yeares, or sell the Land by Deed enrolled: The Case depended in London before the Judges of the Sheriffs Court. The King, by colour of a false Office, which doth falsely entitle him to the Inheritance, is seised of certain Land; he who hath right leased the same for yeares by Deed indented; and then an Ouster le mayne was sued, and he enfeoffed a stranger. And it was holden, that the Lease should not bind the Feofee, although it was by Deed indented, for the Feofee is a stranger to the Indenture, and therefore shall not be estopped by it. 18 H. 6. 22. A stranger shall not take advantage of an Esoppel, and therefore shall not be bound by it: As if one take a Lease for yeares by Indenture of his own Lands, the same shall bind him, but if he dyeth without Heir, it shall not bind the Lord in payment of Escheat.

Mich. 31. Eliz. In the common Pleas

CCXXV. Gibbes Case.

Trover and
Conversion

Gibbs brought an Action upon the Case upon Trover and Conversion of a Gelding; and the Case was, that one P had stolen the said Horse, and sold the same unto the Defendant in open Market, by the name of Lister, and the said false name was entered in the Toll-book. And it was holden clear by the Court, that by that sale the property was not altered.

Mich. 31. Eliz. in the common Pleas.

Tenant in Socage leased his Lands for four yeares, and dyed, his Heir within the age of eight yeares, the Spother being Guardian in Socage, leased the Land by Indenture to the same Lessee for fourteen years; It was holden by the Court, that in this Case the first lease is surrendered, but otherwise upon a Lease made by Guardian by Nurture.

Mich. 31. Eliz. in the Common Pleas:

CCXXVII. Kimpton and Dawbenets Case.

P Trespasser, the Defendant did justifie by a grant of the Land, where, &c. by Copy: The Plaintiff by Replication saith, that the Land is customary Land (ut supra) and claimed the same by soverne Copy: The Defendant by Rejoynder saith, that well and true, it is, that the Lord may grant Copies in possession at his pleasure, and also estates by Copy in Reversion, with the assent of the Copy holder in possession, but all estates granted by Copy in Reversion without such assent, have been void. It was argued, that this custom is not good, for it is not reason, that the Lord in dispesing of the customary possessions of his Mannor should depend upon the will of his Tenant at will, and the same is not like to the case of Attornement, for there the Attendancy is to be respited, which is not to be done h. re, for the Copy holder in possession shall continue Attendant to his Lord, notwithstanding such a grant in Reversion, and see for the unreasonableness of the custome, 19. Eliz. 357. in Dyer, Salfords Case: It was moved on the other side, that the Custome was good enough; and 3 H. 6. 45. was vouchred, That every Freehold of a Mannour upon alienation might surrender his Land, &c. It was adjourned.

Mich. 30, & 31. Eliz. in the Exchequer-chamber.

CCXXVIII. Marriot and Pascalls Case in a Writ of Error.

Robert Marriot one of the Attorneys of the Court of Exchequer, brought an Ejectione firme against Mary Pascall, and upon Not guilty pleaded, Misnomer of the Jury found a speciall Verdit, containing this matter ; viz. That King H. 8. the fourth year of his Reign erected and founded an Hospital, by the name of the Master and Chaplains of the Hospital of King Henry the eighth, de le Savoy : And afterwards in the time of Queen Mary, the said Master and Chaplains being seised, &c. leased the same to the Defendant by the name of W. Holgill Master of the Hospital, Henrici nuper Regis Angliae septimi vocat le Savoy & Capellani Hospitalis predict. And afterwards by the sozmer name (which was in truth their very name) leased the same to Thomas Fanshaw, who leased the same to the Plaintiff : And if the Lease aforesaid made unto the Defendant in form and by the name aforesaid, be a good Lease, was all the question. And this matter was argued, and many times debated in the Exchequer, as well at the Bench as at the Bar. And it was agreed by Clerk and Gent, Barons there, That the said Lease made to the Defendant was utterly void by reason of the Misnomer. Manwood argued strongly to the contrary ; and Judgment was given for the Plaintiff, according to the opinions of the said two Barons : Upon which the Defendant brought a Writ of Error in the Exchequer-chamber before the Lord Chanceller, Treasurer, &c. And now this Term it was argued by Godfrey on the part of the Defendant : Three variances have been supposed in this Lease from the Originall Foundation of the Hospital in the name of it. 1. The name of the Foundation is the Master of the Hospital, &c. Et Capellani dict. Hospitali ; So that in the Lease rem'st part of the name (Capellani) as not immediately annexed to Master, as it is in the name of the Foundation. But as to that point, the Justices Assistants delivered Godfrey from the arguing of it, as of a variance not materiall : Another variance hath been objected, because that in the Foundation the words are Hospitalis Regis H. 7. and in the Lease the words are, Hospitalis Henrici septimi nuper Regis Angliae, so as this word (Nuper) is Surplusage, and ex abundant. But of that matter he was also discharged, because it is no variance in substance : But all the difficulty rested in this, that in the Foundation the words are (de le Savoy) and in the Lease (vocat le Savoy) And he put the Case 4 Mar. Dyer 150. The Colledge of Eaton was incorporated by the name of Propositi & Collegii regalis S. Mariae de Eaton iuxta Windsor, and a Lease is made by the name Propositi & sociorum Collegii regalis de Eaton, and that was holden a void Lease : And I confess that in the names of Corporations, we ought to resort to the Foundation of the Corporations, for the name of a Corporation is as a name of Baptisme, and ought to be as precisely observed, but that ought to be intended in matter of substance, and not otherwise, vide 10 Eliz. Dyer 278. The Dean and Chapter of Carlile was incorporated by the name of Decanus & Capital. Ecclesie Cathedralis Stat. & individua Tri. Carl. and they make a Lease by the name, Decanus Ecclesie Cathedralis S. Trin. in Car. et totum Capit. de Ecclesia predict. And the same was holden a good Lease, notwithstanding that variance, which is not in substance of the name. And the Dean and Chapter of Peterborow was incorporated by the name of Decanus et Capital. Ecclesia Petriburgensis, and they made a Lease by the name Decanus et Capitulum Ecclesie de Peterborow, and holden good enough, because the variance was not in any matter of substance : And he cited the Case betwixt Croft and Howell, 20 Eliz. Plow. Com. 337. The Cooks of London were incorporated by the name of Masters, and Governors, and

and Commonalty of the Mystery of Cocks, and they by the Name of Baster and Wardens of the said Craft and Mystery of Cocks made a Conveyance, and it was holden that the variance assigned in the abundance of this word (Craft) in the Conveyance, which was not in this Corporation, was not any material variance, but only matter of surplusage, for (Craft) and (Mystery) are all one, and of one sense, &c. And so in the principal Case, The Hospital de le Savoy, and the Hospital vocat. le Savoy, touch the same, and in effect do not differ. And as it was said by the Lord Chief Baron in his Argument in the Court of Exchequer, in this case, four things are only to be respected in the Name of a Corporation: First the Name of the living persons who are the Corporation, as in our Case the Baster and Chaplains: Secondly, the house in which they are resident, and make their abode: Thirdly, The Name of the Founder: Fourthly, the place upon which the place of their abode is built and erected. And if these four matters are sufficiently set down, although not formally, it is good enough. It hath been objected, That the Hospital de le Savoy, and the Hospital vocat le Savoy, be much differ, for de le Savoy, implieith the demonstration of the Place, but vocat le Savoy, trencheth only to the Name, As if the Dean and Chapter de Pauls in London, make a Lease by the Name of Dean and Chapter of Saint Paul vocat. London, so if the Baster and Fellows of Trinity Colledge in Cambridge make a Lease by the Name of Baster and Fellows of Trinity Colledge vocat. Cambridge, such Leases are utterly void. I do well agree those Cases, for the Dean and Chapter is not all London, but part of London, and therefore cannot be called *as* London, and so Trinity Colledge is but part of Cambridge, and therefore cannot be called Cambridge, but here in our case, The Hospital is not parcel of the Savoy, but the whole Savoy is the Hospital, and there is not any part of the Savoy, which is not the Hospital; But if Trinity Colledge in Cambridge make a Lease by the Name of Baster and Fellowes Collegii vocat. Trinity Colledge in Cambridge, it is a good Lease: And he putt a difference, where the word in the Name of the Corporation, which precedes (de) is all one, and of the same Nature with the word which followes (de) and where on the contrary, as in our case. The word which precedes (de) is Hospital, and the words which follow (de) are le Savoy: are all one and the same thing, so as the Hospital and Savoy, are all one and the same, and therefore may be well called Le Savoy, and also (de) and (vocat.) in construction are the same, and so our Lease is good enough: and it is found by verdict, That this Hospital was erected upon the Duncur of Savoy, and therupon it is now commonly called Le Savoy, without any addition of Hospital, for as it was called Savoy before it was erected into an Hospital, so it is also called after the Erection, and true it is that the misnaming of a Corporation in any small thing shall abate a Writ, for there is only delay, yet it is not of force in a Conveyance, unless the misnaming be in a point material. Coke to the contrary, The variance from the true Name of a Corporation which shall prejudice a Conveyance ought to be in matter of substance, for variance in matter of form and circumstance will not hurt it, sed parum differentia quae concordant. And first it is to be confessed, That the Name of a Corporation is as the Name of Baptism, which admits of no variance, and therefore it is said 38. E 3. 15. by Knivet, when a Man sounds a Chantry or a house, &c. it ought to bear such Name as his Founder hath given to it, for that is its proper name. And so it hath been Re pozed by Bendloes, Serjeant, 4. and 5. Phi. and Mar. That it was holden for a positive Law, by all the Judges of England, That the mistaking of the Name of a Corporation in any matter of Substance, makes the Conveyance utterly void, for a name is given to a Corporation upon the Foundation, and that by the same Name they shall implead and be impleaded, but that ut idem nomen, et sub eodem nomine sint habiles ad perquireand. & concedend. to be impleaded, and to

implead, but that is to be meant idem re, for it is not necessary, that it be idem littera, for, qui ~~haec~~ ⁱⁿ littera, haec in Cortice, but if it be idem re with the Foundation it is well enough. And therefore it hath been adjudged; That where the Colledge is incorporated by the Name of Masters and Fellows, Collegii Sc. & individ. Trinit. in Cantabridg. and they make a Lease by the Name of Collegii Trinit. this is good enough, for the word Trinity, implies, and imports Sc. & individ. And therefore such variance was holden not material. But here in our case is a variance in Substance, betwixt the Name given to the Hospital upon the foundation, and the name usurped in the Lease. And the same will clearly appear upon my Argument, viz. If the Name given to this Hospital upon the foundation of it, and the Name usurped in the Lease be not usum in sensu (not in your private understanding as private persons, but in your judicial knowledge upon the Record quod coram vobis resideret, as Judges of Record) then this lease is void, for although you as private persons, otherwise then by Record, know, That the Hospitall of Savoy, and the Hospital vocat. le Savoy, are all one Hospital; you ought not upon that your private knowledge to give Judgement, unless also your judicial knowledge agree with it; that is, the knowledge which is out of the Records which you have before you: But if the Name given upon the foundation, and the usurped Name be not idem sensu in your Judicial knowledge, and you cannot otherwise conceive the Identity of these two Hospitals, nor make any Construction to imagine it but by the Record, for the Record is your eye of Justice, and you have no other eye to look unto the cause depending before you, but the Record, and to this purpose he cited the case of 7 H.4. 108. Where a man killed another in the presence of a Judge travailing on the way where the murther was, And at the next Assises in the said County before the same Judge, another man is indicted of the same murder, and arraigned, and convicted by verdict; In that case, The Judge he ought not to carry himself according to his private knowledge, which he hath of the said fact, scil. to acquit the Prisoner, but all that he can do is to respite Judgement against the party, because of the Judges knowing to the contrary, and to make further Relation thereof to the King for his Pardon of grace for the Party. So in our Case. It may be that you in your private knowledge know, That the Hospital de le Savoy, and the Hospital vocat. le Savoy, is all one, but that doth not appear unto you upon the Record which is before you, but it may be for any thing that appears in the Record, that they are diverse and several Hospitals; Therefore the Lease is void. To prove my Point, I do say that this word (de) as here, de Savoy, designes a place, so as by this word (de) the place is become parcel of the Name, but this word vocat. locum non denotat, but onely the very name, and so here is a material difference and variance, for here by presence of the Name in this Lease, there is not any place of the Corporation in the Name, but the Corporation is transitory, which cannot be, for a Corporation especial consisting of many persons, as Corpus aggregatum ought to have a certain place of their abiding, or otherwise it cannot be discerned by the Law, and it is but a Mathematical thing, and nothing else but a fiction, and they cannot be otherwise considered in Law, but as they are circumscripsi within the bounds of their house, and they cannot appear but by Attorney: and if a Prebend consist upon a Manoz, and afterwards the Manoz by writ be demanded against the Prebend, and he loose it, here he hath lost his Name, because he hath lost that which giveth to him his Name, by contrary by Blayke for his estate and place, in the Chapter, doth remain unto him: And secondly, for another Cause here is a material variance, for this word (de) supposeth a place before the Foundation, as the place upon which the Hospitall was erected was called Le Savoy before the Erection of it; but these words (vocat. le Savoy) supposeth the same Name Savoy was imposed upon the Foundation; Thirdly, these words (de le Savoy) do import the Hospital

Hospitall to be part of the place, which before the Foundation, was called Savoy, but vocat: trencheth only to all the place called Savoy: Fourthly; (de le Savoy) is matter of certainty and verity, (vocat.) but matter of Reputation. And so for these four reasons, great difference in substance appearith betwixt the very name of the Hospital, and the Name usurped in the Lease. And he cited the Case 29 Eliz. in the Kings Bench betwixt Hall and Wingat. King E. 4. did incorporate the Dean and Canons of Windsor, by the Name of Dean and Canons of the King and Queens Free Chappel of Saint George the Martyr within his Castle of Windsor; and made a Lease by another Name, viz. by the Name of Dean and Canons of the King and Queens Free Chappel there, and the same Lease was made in the time of Queen Mary, and it was holden that the same was a variance in Substance. And he cited another Case 30. Eliz. in the Kings Bench betwixt Fisher and Boys. A Colledge in Oxford was by Act of Parliament incorporated by the Name of Warden and Scholars, Domus sive Collegii Scholarium de Merton in universitate Oxonie, and they made a Lease by the Name Custos Domus sive Collegii de Merton in Oxonia, and Schollares ejusdem domus, and the variance in that point, because in the very name of the Foundation, Domus sive Collegii Scholarium de Merton, and in the usurped name in the Lease Domus sive Collegii de Merton, was holden material, and the true name was de Merton in universitate Oxonie, but in the Lease, in Oxonia only, leaching out the word University, and the same was holden a variance in substance: For Oxford doth contain in it self the University, which is a thing of it self, and also the City is a thing by it self: and it may be that there is a Colledge in the City called Merton Colledge, and also a Colledge which is called by such Name in the University: and so in our Case, it may be that there is an Hospitall which is called the Savoy, and also another which is Le Savoy, and then the Court shall be enveigled, &c. And in the end of the Argument, the Lord Treasurer, which was the Lord Burleigh, put this Case, which was adjudged in his time. The Guild of Boston in Lincolnshire, was incorporated by the Name of the Guild of St. Nicholas, and our Lady the Virgin Mary, &c. and they made a Lease for years by the Name of the Guild of our Lady the Virgin, and Saint Nicholas, Religione quadam moris ut nomen Virginis Marie, in charta dimissionis, proponeretur nomini Sancti Nicholai; and it was adjudged a void Lease for the variance aforesaid. And afterwards at another day, the matter was argued by Atkinson, on the part of the Defendant. Starkey 21 E. 4. 56. saith, That the Name of the Corporation, by which it is incorporated, is as properly the Name of a Corporation; as the Name of Baptism is the Name of a single and individual person, and yet there is a great difference in the mispunction of them, for the Name of Baptism doth consist of one word, and therefore it cannot admit of any variance, but the Name of a Corporation doth consist of many words: in which case variance in words which are supplied by other words, and not in matter of substance shall not hurt; and that heating is notably discussed in the case of the Cooks of London, cited before by Godfrey. Four things are to be considered in the Name of a Corporation, which are of the Essente and Substance of it: First, the persons incorporated, of which the Corporation doth consist, as heret the Master and Chaplains de Savoy. Secondly, The quality of the Corporation, as Dean and Chapter, Mayors and Commonalty: Thirdly, the Patron or Founder, as, Merton Colledge; Fourthly, The Place whereupon the Corporation is founded; as to this last point, see 31 E 3. 28. and so 15. by Knivet, and see 6 Eliz. Dyer. King H 8. erected the Dean and Prebend of Chester, by these words, scilicet Decanus et Capit. Cathedralis Ecclesie Christi, et Sancte Marie Virginis Cestrie. And afterwards by Letters Patents, gave to the said Dean and Chapter, certain Manors, Decano et Capitulo Ecclesie Cathedralis Christi et Sancte Marie Virginis, by us before erected, and that

that grant was holden void, because that the place where, &c. is not expesed in the said Letters Pattents, for Cestria is the local place of the Incorporation. And as to the Objection made upon the word (de) that this word (de) goeth only to part, and (vocat.) goes to the whole, and so here is a great difference; the same is not any reason, for this word (de) extends as well to the whole as to part. As a Rent granted perciplend. de Manerio de D. the same shall go to the whole Mannor, 3 E 4, 3. ad respondendum L. Abatti Monasterii Sancte Marie Ebor. where the Obligation was, Abbati Monasterii Sancte Marie Virginis extra mure Ebor. and yet the Writ was well enough, notwithstanding such variance, a fortiori, in the case of a colluviance and Interest. And I conceive that it appeareth in the Record, That the Lease given in evidence of the part of the Defendant, is a Lease made by the Master and Chaplains of the Hospital of the Savoy, for it is found by verdict, That King Henry the eighth, upon the Scite of the Mannor of Savoy, betwixt the house of the Bishop of Worcester, and the house of the Bishop of Carlisle, and that it was incorporated by the Name, &c. and that afterwards Q Mary by her Letters Pattents, reciting the foundation of the said Hospital called the Savoy, and lamenting the Ruin of it, being surrendered in the time of E. 6. did restore it, by which it appeareth, That the Hospital of the Savoy, and Hospital called the Savoy is one and the same in respect of the Bounds, Foundation, and Sustination. And in the whole course of our Books, no case can be found, That any Corporations have avoided their own acts, by such cause of Misnomer, nor of such matter, is any question moved in our Books. And as to that which hath been objected, That although the Judges in their private knowledge well know, That the House de le Savoy, and the House vocat. the Savoy, be all one, yet they ought not to judge according to such their private knowledge, but according to their judicial knowledge, which they have out of the Record. I conceive, That the Judges of necessity ought to use in such cases their private knowledge: as where Misnomer of a Colledge was objected, viz. Trinity Colledge in Cambridge, where it was incorporated by the Name of Masters, Fellows, and Schollars Collegi Sancta & individua Trinitatis. and they made a Lease by the Name of Master, Fellows, and Schollars of the Colledge of Trinity, the same was holden a good Lease, for the Judges knew well enough, That this word Trinity doth imply in it self Sancta & individua, but by what knowledge? not by their judicial knowledge, but by their private knowledge. So in our case, Egerton the Queens Solicitor to the contrary: It is a clear and plain Rule in our Law, That the name of a Corporation is as a name of Baptism to a natural man, and if there be any difference, I conceive, that the Law requires more strict certainty in the name of a Corporation than in the Name of any particular person, for a name is more necessary to a Corporation than to another, for when an infant is born, he is presently a perfect creature, before any name given him, and the giving of the Name is not a matter of necessity, but of policy for distinction, &c. but in the case of a Corporation, The Name is the substance and essence of it, and it is not a Body before a Name be imposed upon it, and therefore in the Charters of Corporations there is alwaies such a clause, per tale nomen impacitare, & implacitari, acquerire, &c. possunt, and without their Name, they are but a Trunck: but contrary in the case of particular persons; land is given primo genito filio J S; It is a good gist, although there be no Name of Baptism: Lands given omnibus filiis J. S. is a good name of purchase, and if a man be bound in an obligation by a wrong or false Name, and in an action brought upon the same, if it appeareth upon evidence, that he was the same person which sealed and delivered it, the same is sufficient, and the Bond shall binde him. But contrary in the case of a Corporation, and we cannot give any thing to a Corporation by circumstances, inuring or implying

ing their true name. As Land given to the first Hospital which the Queen had founded, although that it sufficiently appear, That such a one was the Hospital which the Queen first founded, yet the gist is bold: And he denies, That the four things remembred before are necessarily required in the Name of a Corporation: for if the Queen will found a Corporation, as an Hospital by the Name of Utopia, the same is well enough without any respect of persons, place, Founder, &c. set forth in the Charter. And also other things besides the said four things are sometimes necessary in a Corporation: As if the Queen will found an Hospital by the Name, Quod fundavimus ad rogationem Christi. Hatton Cancel. Angliae. all the same ought to be expressed in every grant made by, or to the said Hospital; So, Quod fundavimus ad relevandum pauperes; and sometimes the number of the persons incorporated, if it be in the Charter, it ought to be used in all acts made by or to them; As Master and six Chaplains, so as the said four things recited before, are not so necessary in the Name of a Corporation, but so far forth as they are parcel of the Name given to them in the Charter of the Corporation: And in our case, i. The place de le Savoy, is part of their name, set down in the charter of their Corporation, and therefore the same ought to be precisely followed; and he relied much upon the argument of Cook in noting material variances, betwixt de le Savoy, and vocat. le Levoy, as (de) signifies part (vocat.) the whole (de) signifies the place de facto: vocat. implies reputation only. There is a place near unto Whitehall called Scotland, because that the Kings of Scotland, when they came to our Parliament used there to reslede, as the Lord Treasurer affirmed. There is also a place in England called Normandy, and another called Calais, and also a place here in Westminster called Jerusalem, but these, Scotland, &c. but by Reputation, so as what difference is betwixt the very Scotland and Scotland here, &c. such and so much difference is there betwixt the Hospital de le Savoy, and the Hospital vocat. the Savoy. And as to that which hath been objected by Atkinson, That this word (de) signifies as well the whole as part, as a Rent granted percipiendo. de Manerio de D. I confess that this word (de) hath many significations, so that we ought not only to consider what (de) signifies of it self, but rather to observe what goes before, what follows; for, as saith Hillary, intelligentia verborum ex causa dicendi sumenda est. And this word (de) is a material word in the Name of a man, therefore also in the name of a Corporation, 26 H. 8. 31. Assise by J. de S. and it was found for him, and afterwards the Tenant in the Assise brought attaint, and in the rehearsall of the Assise in the writ of attaint he was named I. S. leaving out (de) and for that cause the Writ was abated, 28 E. 3. 92. Debt brought by the Executor of John Holbech, where the Testament was John de Holbech, and for want of this word (de) in the Writ, it was abated by Award. And in a Precepte quod reddat, against Mich. de Triage, he cast a Protection for Michael Triage, leaving out (de) and for such variance the Protection was disallowed, and a Petit cape awarded. And althoough the Judges in their private knowledge know well enough, That the Hospital de le Savoy, and the Hospital vocat. the Savoy, be all one, yet in point of Judgement they ought not otherwise receive information, but out of the Record, and therefore, if sufficient matter be not within the Record to inform the Judges of the Identity of the said two Hospitals, their private knowledge shall not avail. And he cited the cause of the Leyd Conies, where the Parties being at issue, and the Jury charged for the tryal of it. It was found by special verdict, That a fine was levied of the Lands in Question, &c. but nothing found of the proclamations, whereas in truth, the proclamations were as well given in evidence as the fine, But found, Quod finis levatus fuit pro, ut per recordum finis ipsius, in evidentiis ostensum, plenius appareret. Now in that case, although that the Justices, knew well enough, That the Proclamations were expressly given in evidence, yet

yet because it did not appear unto them as Judges out of the Record, They would not give Judgement, according to the truth of matter, but according to the Record, for they cannot take notice if the Proclamations be in Chirographers Office or not. But after it appeared unto them, That that defect was but a slip of the Clerk, they commanded the Record to be brought before them, and the proclamation to be inserted in the verdict. And then gave Judgement according to the verdict reformed as aforesaid, and as to the Case of Martin Colledge cited before, he said he was of Council in it, and he knew, That the Judgement there was not given for the cause alledged by Cook, but because that this word, Schollars, was left out in the Lease. And he held, that if in the principal Case, the Lease had been, That the Master and Chaplains of the house called the Hospital of the Savoy, &c. it had been well enough, so there is, de le Savoy, See a good case 36 H 6. fitz. Brief. 483. by Danby a Corporation cannot be Tenants of Lands, but according to their Corporation, and their foundation, and their very Name, nor they cannot be impleaded, nor take Lands by a wrong Name, nor purchase, nor dispose of their possessions, but by their true Name. And afterwards the matter was compounded by the mediation of Friends: and Fanshaw had the Lease for a certain sum of money. See now Cook 10. Reports, The Case of the Mayor and Burgesses of Lyn Regis: See also c. II. p. Doctor Arays Case, to this purpose.

Mieb. 30, & 31 Eliz. in the Common Pleas.

CCXIX. Huson and Webbes Case.

Robert Huson brought an action of Debt against Anne Webbe, Administratrix of Joan Webbe, and declared of a Contract without specialty. The Defendant pleaded, That she had fully administered, and it was found against her. And now it was moved so; the Defendant, That upon the making an action of Debt doth not lie against the Executrix or Administratrix; which was granted by the Court; But the doubt was, If now, soasmuch as the Defendant by pleading the plea above, hath admitted the action, she shall now take advantage of the Law in that point. For the reason why this action doth not lie against an Executrix or Administratrix, is, because the Testator himself might have waged his Law, if he had been impleaded upon it, and by intendment of Law the Executrix or Administratrix cannot have notice of such a debt, or of the discharge of it; But now by answering to the Declaration as above, the Defendant hath taken notice of the Debt, and in manner confessed it. And by Rhodes and Anderson, Judgement shall be given against the Plaintiff, because it is apparent to the Court, that the action doth not lie. And by Anderson, if Judgement be entered against the Administratrix, in such an action upon Nihil dicit, the Court, ex officio, shall give judgement against the Plaintiff. Periam and Windham doubted at the first that the Defendant by her plea had admitted the whole matter upon the specialty administered, pleaded, and had taken notice of the Debt, 41 E. 3. 13. 46. E. 3. 10, 11. 13 E. 4. 25. 13 H. 8. Fitz. Execut. 21. And afterwards Anderson, ex assensu of the other Judges; caused to be entered, Querens capitatum nihil pet breve.

Michigan

*Micb. 30, & 31. Eliz. In the Common Pleas. In rrat. Micb. 79.
C 30. Eliz.*

C C XXX. Hambleden and Hambledens Case.

Deuiles-

The case was, William Hambleden the Father of the Plaintiff, and the Defendant, was seised of the Lands, &c. And by his Will devised to his Eldest Son, Black Acre; to his second Son, White Acre; and to his third Green Acre, in tail. And by his said Will further willed, That in Case any of my said Sons do dy without issue, that then the Survivor shalbe each others heir, The Eldest son dyeth without issue, &c. It was moved by Gawdy Serjeant, That the second Son shall have Black Acre in tail, and he cited the Case 30 E 3. 28. propinquioribus hereditatibus de sanguine puerorum, for the construction of such devises. Walmesley argued, That both the surviving brothers shalbe have the said Black Acre, for the words of the devise are quilibet supervivens, which amounts to uterque; and the Court was in great doubt of this point. And they conceived, That the estate limited in Remainder to the Survivors &c. is a fee-simple by reason of the words, Each others heir, and also they conceived, That both the Survivors shalbe not have the Land, for the same is contrary to the express words of the devise, The Survivor shall be each others heir, in the singular number, see 7 E 6. br. Devise 38. A man seised of Land hath issue three Sons, and deviseth part of his Lands to his second Son in tail, and the residue to his third Son in tail: and willeth, That none of them shall sell the Land, but that each shall be heir to the other, The second Son dyeth without issue, the same Land shall not revert to the eldest Son, but shall remain to the third Son, notwithstanding the words each shall be heir to the other.

Micb. 30. & 31. Eliz. In the common Pleas.

C C XXXI. Slywright and Pages Case.

Maintenance. **A**n Information was in the Common Pleas, by John Slywright against Page, upon the Statute of 32 H 8, of Maintenance, and declared that the Defendant took a Lease of one Joan Wade, of certain Lands, whereas the said Joan was not seised nor possessed thereof according to the Statute; and upon Not guilty, the Jury found this special matter, That Edmund Wade was seised, and made a Feoffment in fee, thereof unto the use of himself, and of the said Joan, who he then intended to marry, and the heirs of the said Edmund. The marriage took effect, Edmund enfeoffed a Stranger, who entered, Edmund dyed: Joan not having had possession of the said Land after the death of Edmund her husband, was being now in possession, by Indenture demised the said Land to the Defendant for years, without any Entry or delivery of the Indenture upon the Land, The said Defendant, knowing the said Joan never had been in possession of the said Land: and also the Defendant being brother of the half blood to the said Joan. The first Question was, If the Lease being made by one out of possession, and not sealed or delivered upon the Land, and so good in Law as to passe any interest, be within the Statute aforesaid. And the whole Court was clear of opinion that it was: for by colour of this pretended Lease, such might be undertaken and advanced to the trouble and disquiet of the possession, for amongst the vulgar people, it is a Lease, and it is a Lease by Reputation: Another matter was moved, because that the entry of the wife is now made lawfull by 32 H. 8. and then she might well dispose of the Land.

But

But as to that, It was laid by the whole Court, That the meaning of the Statute was to repelle the practices of many, That when they thought they had title or right unto any Land, they for the furtherance of their pretended right conveyed their interest in some part thereof to great persons, and with their countenance did oppresse the possessors: And although here the Lease was made by the said Joan to her Brother of the half blood, yet by the clear opinion of the Court the Lease is within the danger of the Statute, and yet in some Case the Son may maintain his Father, and the Kinsman his Kinsman. And note in this case it was holden by the Justices, That of necessity it ought to be found by verdict, That the Defendant knowing that the Lessor never had been in possession. And Judgement was given for the Plaintiff.

B
Mich. 30, 31. Eliz. in the Common Pleas.

CC XXX II. Brokesby against Wickham and the Bishop of Lincoln.

In a Quare Impedit, the Plaintiff counted, That Robert Brokesby was Quare impedit of the Adowson, and grant'd the next Avoindance to the Plaintiff, and Humphrey Brokesby, and that afterwards the Church became void, and after during the avoindance, Humphrey released to the Plaintiff, and so it belongs to him to present. And upon this count the Defendant did demurr in Law. For it appeareth upon the Plaintiffs own shewing, that Humphrey ought to have joined with the Plaintiff in the action, for the Release being made after the church became void, is not of any effect, but utterly void. So is the grant of the preffentment to the Church where the Church is void, for it is a thing in action. See the Lord Dyer, 28 H. 6. 26. 3 Ma. Dyer 129. 11 Eliz. Dyer 283. Walmesley Serjeant put this Case, Two Joint-tenants of a Rent, the one may release to the other, but if the Rent be behinde, now the one cannot Release his Interest in the Arrearages to the other. And afterwards in the Principall case, Judgement was given that the Release was void.

*Mich. 30, & 31. Eliz. in the Common Pleas. Instr. Trin. 29.
Eliz. Rott. 721.*

CC XXXIII. Sammes and Paynes Case.

In an Ejectione firmar the case was, That the Mother being seised of certain Lands, had issue two Daughters, and by Indenture covenanted with certesie, diverse persons to stand seised to the use of Eliz. her eldest daughter in tail, upon condition that the said Eliz. should pay to her other daughter within a year after the death of the Mother, or within a year after the said other daughter should come to the age of eighteen years 300 l. And if the said Eliz. should fail in the payment of the sum aforesaid, or should dy without issue before such payment, then to the use of the said second daughter in tail, The Mother dyeth, Eliz. taketh a Husband, hath issue, and afterwards dyeth without issue before the day of payment. And if the Husband shall be tenant by the curteisie or not, was the Question, And by the Court cleerly, he shall be, For as to the condition of payment of the said Sum; The same is not determined; for she dyed without issue before the day of payment, scil. before the second Daughter came of the age of eighteen years; and as to that there is no condition bishken; and as to the point of dying without issue, The same is not a condition,

but rather a Limitation of the Estate, and the same is no more then what the Law saith, and the estate tail in Elizabeth, is spent and determined by the dying without issue; and doth not cease, or is cut off by any Limitation; and afterwards Judgement was given for the Tenant, by the curteisie. And by Anderson; If a Feasment be made to the use of J S and his heirs, untill J D hath done such a thing, and then unto the use of J D and his heirs, the thing is done, and J S dyeth, his wife shall be endowed.

Mich. 30, & 31. Eliz. In the Common Pleas.

C C X X I V. Bowry and Popes Case.

BOWRY brought an action upon the Case against Pope, and declared, that in the time of E.6. The Dean and Chapter of Westmister, leased two houses in Saint Martins in London to Mason for sixty years, The which Mason, leased one of the said Houses to one A and covenanted by the Indenture of Lease with the said A, that it should be lawfull for the said A, his executors, and assigns to make a window in the shop of the house so to him assigned, & afterwards in the time of Queen Mary, a window was made accordingly, where no window was there before. And afterwards A. assigned the said house to the Plaintiff. And now Pope having a house adjoining, had erected a new building super solum ipsius Pope ex opposito the said new Window, so as the New Window is thereby stopped. The Defendant pleaded, Not guilty, and it was found for the Plaintiff; and it was moved for the Defendant in arrest of Judgement, that here upon the Declaration appeareth no cause of action, for the window, in the stopping of which the wrong is assigned, appears upon the Plaintiffs own shewing to be of late erected, scil. in the time of Queen Mary, The Stopping of which by any act upon my own Land, was holden lawfull and justifiable by the whole Court. But if it were an antient window time out of memory, &c. there the light or benefit of it ought not to be impaired by any Act whatsoever; and such was the opinion of the whole Court. But if the case had been, That the house and soyl upon which Pope had erected the said building, had been under the estate of Mason, who covenanted as abovesaid, Then Pope could not have justified the nuisance, which was granted by the whole Court.

Mich. 30. & 31. Eliz. In the Common Pleas. Instrat. Mich. 29.

& 30. Eliz. Rott. 1737.

C C X X V. Lee and Maddoxes Case.

covenant.

WILLIAM Lee brought a Writ of Covenant against Richard Maddox, and Isabel his wife, and declared. That one Errington the first husband of the said Isabel was endebted to the Plaintiff in 20 l. and that one George Ashley was also endebted to the said Errington, in the like sum of 20 l. And also that the said Errington made and constituted the said Isabel his Executrix, and dyed, and afterwards the said Isabel by Indenture dum ipsa sola fuit, reciting tht whereas her said late husband was endebted to the Plaintiff in the sum aforesaid. and whereas the said George Ashley was also endebted unto her said late husband in the like sum, Now for the better satisfaction of the Plaintiff for his said debt, he appointed and constituted the Plaintiff, accurnatum suum irrevocabilem ad petendum, levandum, recuperand. & recipiend. ad usum suum proprium in nomine dicti Isabellae de dicto Georgio, the said twenty sevenes; And the said Isabel covenanted, quod ipsa ad requiri dicti quer. de tempore in tempus, adjuvaret, & manu teneret quamlibet et omnes sectam & sectas

fectas quam vel quas dictus quatuor commisceret & prosecueretur in nomine dictæ Isabellæ, against the said George, to the use of the Plaintiff. Non existendo Non-suit voluntarie, or making any Discontinuance, Release, Recovocation, Angloic Countermand, without the assent of the Plaintiff: And declared further, that the Plaintiff had brought a Suit against the said George for the said Debt, and shewed all uncertain. And that the said Isabel, depending the said Suit, had taken to Husband the Defendant without the assent of the Plaintiff: And if by this Marriage the said Suit be Countermanded was the Question. And first it seemed to the Court that the Declaration was insufficient, because there is not any request furnished in the Declaration, for the words of the Covenant are, Quod ipsa ad requisitionem, &c. So as it seemed to the Justices, that the Plaintiff ought to have notified to Isabel that he had commenced such Suit, otherwise the Action will not lie. And also the Court was of opinion, that here is not any Countermand, for by the taking of the Husband the Writ is not abated, but only abateable, and therefore the Plaintiff ought to have shewed, that by the taking of the Husband, the Writ by Judgment was abated, otherwise it is many Countermand, and then no cause of Action.

Countermand.

Request,

Mich. 30, & 31 Eliz. in the Common Pleas.

CCXXXVI. Salway and Lusons Case.

Matthew Salway brought a Writ of Right against Luson, and the Writ was, Measuring, & 200.acr. jampnor, & bruerz: And exception was taken to the Writ, because jampnor, & bruer, are counted together, where they ought Right

to be distinguished severally, As so many acr. jampnor, & so many acr. bruer, al though it were objected on the part of the demandant in the maintenance of the Writ, that in the Register the Writ of Right is reddit unus libræ of Cloves & Salt together, without distinction or severance. And it was said, that in a writ Abatement of Right we ought to follow the Register, and therefore a writ of Right a Writ.

was abated, because this word (Pomarium) was put in the Writ, for in the Register there is no such Writ, because the word Gardinum comprehendeth it: But in other Writs, as Writs of Entry, &c. it is otherwise. See the Case of the Lord Zouch, 11 Eliz. 353. In a Writ of Entre sur disseisin mille acr. jampnor, & bruer. But this exception was not allowed, for it may be that jampnor, & bruer, are so promiscuous that they cannot be distinguished: Vide 16 H.7.8.9. The respect the Justices there had to the Register, so as they changed their opinions and confirmed the same to the Register.

Another exception was taken to the Writ, because thereby the Demandant doth demand Duas partes Custodiz del Hay in the Forrest of C. And the Court was of opinion that the Writ ought to be Officium Custodiz duarum partium de Hay, &c. and not Duas partes Custodiz, As Advocacionem duarum partium Ecclesie, And not Duas partes Ecclesie. Another Exception, be-

cause the Writ was, duas partes, &c. in tribus dividend. where it should be Divis. for Dividend. is not in any Writ, but only in a Writ of Partition; And by Windham the parts of this Office are divided in Right,

which the Court granted. Another Exception was taken, because that in the Writ it is not set down in what Towne the Forrest of C. is, so as the Court doth not know from whence the Writ should come: For no Venire shall be de vicineto Foresta, as de vicineto Hundredi, & Manerii; And the

same was holden to be a materiall Exception. Another Exception was taken, because a Writ of Right doth not lye of an Office: for at the Common Law an Assise did not lye of it, but now it doth by the Statute of West. Vinc.

2. Cap. 25. for it was not Liberum ten. but the party grieved was put to his Quod permitcat : And of this opinion was the whole Court.

Micb 30. & 31. Eliz. In the common Pleas.

CCXXXVII Smith and La es.Cafe.

The Queen was seised of a Hanno; whereof bl. acr. was holden by Corp in Fee ; the Queen leased bl. acr. to B. for one and twenty years, who assigned the same to the Copyholder, who accepted of it. The Queen granted bl. acr. to C. in Fee, the terms expired, C. entered, and his entry was holden to be congeable, for by acceptance of the same Termes, the Customy Estate was determined, as if the Copyholder had accepted it immediately from the Queen : It was also holden by the Court, that a Lease for yeares under the Seale of the Exchequer may be pleaded, and that without making mention of the Commission, by which the Court of Exchequer is authorized to make such Leases : And so are all the Presidents as well in this Court as in the Court of Exchequer. And whereas the Court was upon the point of giving their Judgment, It was objected by Shuttleworth Serjeant, That here is pleaded a Bargaine and Sale of Land, without saying, Pro quadam pecunia summa : And he stood much upon the Exception, and the Court also doubted of it, and demanded of the Preignothorizes what is their forme of pleading : And by Nelson chief Preignothorze, these words Pro quadam pecunia summa, ought to be in the pleading. Scot Preignothorze contrary. Anderson conceived it was either way good, but Pro quadam pecunia summa is the best : And so Lennard Custos Breviae conceived. And the opinion of the Justices was, that a Bargaine and Sale for divers Causes and Considerations is not good without a summe of money. And by Windham, Bargaine and Sale Pro quadam pecunia summa, although no money be paid, is good enough, for the payment of; not payment is not traversable : And by Periam, If Pro quadam pecunia summa be not in the Indenture of Bargaine and Sale, yet the payment thereof is traversable. And for this Exception the Judgment was stayed.

Micb. 30. & 31. Eliz. In the Exchequer Chamber.

CCXXXVIII Bedell and Moores Cafe.

Action upon
the Cafe for
not performing
an A-
ward.

Error.

Bedle brought an Action upon the Cafe against Moore in the Kings-bench, and declared, That the Defendant did assume to performe the Award of J.S. and assumed also, that he would not sue Execution upon a Judgment which he had obtained against the Plaintiff in an Action of Account, &c. And shewed further, that the Award was made, &c. (which Award in Law was utterly void), and that the Defendant had not performed the said Award, and also that he had sued Execution against the Plaintiff. The Defendant pleaded Non-assumpsit, and it was found for the Plaintiff, and Judgment given accordingly. Upon which Moore brought a Writ of Error in the Exchequer-chamber, upon the Statute of 17 Eliz. And alledged Error, because the Plaintiff had declared upon two Breaches, whereas for one of them there was not any cause of Action, for the Award is void in Law, and then no breach could be assigned in that : and then when the Jury hath assed Damages intirement for both breaches, whereas for one there was not any cause of Action by the Law, the Verdict was void, and then the Judgment given upon it traversable ; for it is not reason that the Plaintiff have Damages for such matter for which the Law doth not give an Action.

And

And if the Jury had asselshed damages severally, viz. For the not perfo^rmance of the Award so much, and for the suing forth Execution so much, then the Judgement had been good, and the damages asselshed for the not performance, &c. void. Manwood Chief Baron: The verdict is well enough for here the whole Assump^tion is put in issue, and there is but one issue upon the whole assump^tion, but if several issues had been joined upon these severall points of the Assump^tion, and both had been found for the Plaintiff and damages, asselshed entirely for both breaches, then was the Judgement reveresable, for being several issues the Jury might have asselshed the damages severally, scil. for each issue several damages, but here is but one issue, and it was the folly of the Defendant that he would not demur in Law upon the Declaration for one part, scil. the not performance of the Award, and traverse the other part, scil. The suing of the Execution, or the Assump^tion of it. And in our case, it may be that the Jury did asselshed the damages for the suing of the Execution without any regard had to the performance of the Award: And note that the verdict for asselshed of the Damages was in these Terms, scil. Et assidunt damna occasione non performance Assumptionis predict. &c. And Cook who was of Council in this Case, put this Case. The late Earl of Lincoln, Admiral of England, brought his action of Scandalis Magnatum, and declared, That the Defendant exhibited in the Star-chamber against him a Bill of Complaint, containing diverse great and infamous slanders: viz. That the said Earl was a great and outrageous opp^{er}ator, and used outrageous oppression, and violence against the Defendant, and all the Country also. The Defendant pleaded, Not guilty, and found for the Plaintiff, and asselshed damages, and it was moved in Stay of Judgement, first, That the Plaintiff had declared upon matter of slander for part, for which an action lyeth, and for part not. For for the oppression supposed to be made to him self, no action lyeth because every subject may complain for wrong done unto him, and although he cannot prove the wrong, an action will not ly. But as for the oppression done to others by the supposal of the Bill an action lyeth, for what is that to him, he hath not to do with it, for he is not pars gravata. But because the Jury asselshed Damages entierly, the Judgement was arrested, for the cause aforesaid. And afterwards in the principal case, the last day of this term, Judgement was staled.

Hill. 31 Eliz. in the Kings Bench.

C C X X X I X. Palmer and Thorps Case.

Betwixt Palmer and Thorpe, the Case was this, A man demised his Hauour of M for thirty two years, and the day after let the same Hauour for forty years, to begin from Michaelmas, after the date of the first Lease, and the Tenant attorned. And by Cook the same is a good grant although to begin at a day to come, for it is but a Chattel; and so was the opinion of Wray Chief Justice, for a Lease for years may expect its commencement, as a man seised of a Rent in Fee grants the same for twenty years from Michaelmas following, and good, for no estate passeth presently; but only an Interest. See 28 H. 8. 26. Dyer.

D....

Hill. 31. Eliz. In the Kings Bench. Rot. 668.

CCXL. Sir Anthony Shirley and Albanyes Case,

Asumpt.

In an action upon the Case, upon Assumpsit by Sir Anthony Shirley against Albany. The Plaintiff declared, That he was seised of the Manor of Whittington for the term of his life, the Reversion to the Earl of Arundell in fee, and so seised, surrendered all his Estate to the said Earl, who afterwards by his Deed granted a Rent charge of 40 l. per ann. out of the said Manors to him, and afterwards conveyed the Manors to the Defendant in fee. And afterwards, 27 Maii 22. Eliz. upon a Communication betwixt the Plaintiff and the Defendant concerning the said Rent: the Defendant did promise to the Plaintiff, that if the Plaintiff would shew unto the Defendant any Deed, by which it might appear that he ought to pay to the Plaintiff such a Rent, he would pay that which is due, and that which should be due from time to time. And further declared, that 27 April, 27 Eliz. he shewed unto the Defendant a Deed, by which it appeared that such a Rent was granted, and due. And for eighty pounds due for the two last years, he brought the Action; The Defendant pleaded, that after the said promise, and before the shewing of the said Deed, sc. 14. Jan. 22 Eliz. the Plaintiff entered into the said Land, and leased the same for three years: The Plaintiff Replicando said, that 1. Decem. 27 Eliz. the Defendant did re-enter, upon which they were at Issue, and it was found for the Plaintiff. It was moved by Glanvil Sergeant, that by the entry the Promise was suspended, and being a personall thing once suspended, it is alwaies extinct. Wray, the Action is wrought for the Arrearages due the two last years, and so at the time of his re-entry the Plaintiff had not cause of Action, and therefore it could not be suspended. Gaudy, When the Plaintiff sheweth the Deed, the Defendant is chargable to arrearages due before and after the promise: wherefore if the entry maketh a suspending of the Rent, the suspension doth continue: but I conceive here is not any suspension, for this promise is a meer collateral thing, and so not discharged by the entry unto the Land, for it is not issuing out of the Land: But if the Plaintiff before the Deed shewed had released all Actions, the same had been a good Bar, and I conceive that the Deed was not shewed in time, for it ought to be shewn before any arrearages due after the promise, but here it is shewn five years after: But that was not denied by all the other Justices. Another exception was taken, that where the promise was, that if the Plaintiff shewed any Deed by which it might appear, that the Defendant should be charged with the said Rent, and the Declaration is, by which it might appear, that the Plaintiff ought to have the Rent, &c. so as the Declaration doth not agree in the whole. See 1 Ma. 143. in Browning and Bekons Case, the Condition of the Lease was, if the Rent should be arreared, not payd by two Months after the Feast, &c. and the Responder was by the space of two months, &c. And the pleading holden insufficient, for per duos menses doth not affirm directly post duos menses, but by Implication and Argument: And here it was holden, that the Condition was a good consideration. Another exception was taken, because the promise is layed. All the Rent ad tunc debitum aut deinceps debend. It was holden, that this word (ad tunc) doth refer to the time of the shewing of the Deed, and not to the promise. And as to the last exception but one, it was resolved, that the Declaration, notwithstanding the same, was good enough (sc.) ostendit factum per quod appetet quod redditus praedit. solvi deberet in forma predict. Another exception was taken, because here no breach of the promise is alleged,

Suspension of
Rent.

ledged, for it is pleaded, that eight pounds de annuali redditu arter, fuer. but it is not said, de redditu predict. &c. ergo it may be another Rent, and then the promise, as to this Rent, is not broken. Wray, Although the word (predict.) be wanting, yet the Declaration is well enough, and it shall be intended the Rent mentioned before. See 21 H.7.30.b Where (Villa West.) shall be intended Villa predict. 19 E. 4. 1. In a Quare Impedit the Plaintiff doth entitle himself by grant of the next A voidance cum acciderit, and doth not shew in his Count that the same was the next A voidance, and yet the Count was holden to be good, for so it shall be intended: so here: And he sayd, It is not necessary that a Declaration be exactly certain in every point, but if one part of it expound the other, it is well enough: And although the Identity of the Rent doth not appear by the word predict. yet it appeareth by other circumstances, as by the dayes of payment, &c. and no other Rent can be intended. And now, this Exception is after Verdict, and therefore fauourably to be taken: And afterwards Judgment was given for the Plaintiff.

Hill. 31. Eliz. In the Kings Bench.

CCXL I. Musted and Hoppers Case.

In an Action upon the Case, the Plaintiff declared, That where he and one Atkinsal, were joynly and severally bounden by Obligation in fifty pounds, to a stranger; for the only debt of the said Atkinsal, which Atkinsal dyed, and the Defendant married afterwards his Wife, and so the Goods of Atkinsal came to his hands; yet the Plaintiff, the first day of May after, which was the day of payment of the money, paid five and twenty pounds for avoiding the Forfeiture of the penalty. The Defendant as well in consideration of the Premises, as in consideration that he might peaceable enjoy the Goods of the Testator promised to pay the said summe, cum inde requisitus fuer. And upon Non assumpcio, the Jury found the payment of the said summe, and all the precedent matter: And that the Defendant in consideration praemissorum, promised to pay the said summe if he might peaceably enjoy the Goods of the said Testator. It was moved in arrest of Judgment, that although here the Jury have found sufficient cause of Action, yet if the Declaration be not accordingly, the Plaintiff shall not have Judgment. And here the Plaintiff hath declared upon two Considerations, and the Jury h.ath found but one, scilicet if he peaceable enjoy the Goods of the Testator. Also the plaintiff declared of a simple promise, and the Jury have found a Conditionall, Si gaudere potest, &c. And so the promise set forth in the Declaration, is not found in the Verdict.

Gawdy was of opinion, That the first consideration is good, for the Plaintiff entered into Bond at the request of the Defendant, and then the promise following is good: But the second consideration is void, scilicet That the Defendant shall enjoy the goods of the Testator, &c. as if it had been that he should enjoy his own goods, and all the Justices were clear of opinion: That the Promise found by the Jury is not the promise alledged in the Declaration, and so the issue is not found for the Plaintiff, and so the judgement was quayed.

{Creckmere and Pat. {Dove and Williots {Bulleyn and Graunts
 tersons Case. } and others Case: } Case.

Trinit. 30. Eliz. In the Kings Bench, Rot. 568.

C C X L I I . Creckmere and Pattersons Case.

Devises conditionall. **U**pon a special Verdict, the Case was this, Robert Dookin was seised of certain Lands in Fee, and having issue two Daughters, devised the same to Alice his Eldest Daughter, that she should pay forty pound to Ann, her sister at such a Day: the money is not paid, whereupon Anne entreth into the moiety of the Land: And it was holden by the whole Court, that the same is a good Condition, and that the Entry of Anne was lawfull. It hath been adjudged, That where a man deviseth his Land to his wife, Provis, My will is, That she shall keep my house in good Reparations, that the same is a good Condition. Wray, A man deviseth his Lands to B. paying 40 l. to C, it is a good condition; for C hath no other remedy, and a Will ought to be expounded according to the intent of the Devisor.

Hil. 31. Eliz. in the Kings Bench:

C C X L I I I . Dove and Williots and others Case.

In an Ejectione firmar, upon a special Verdict, the case was, That W was seised of the Land, where, &c. and held the same by Copy, &c. and surrendered the same unto the use of E for life, the Remainder to Robert and A. in Fee, Robert made a Lease to the Defendant; E, Robert, and A. surrendered the said Land, scil. a third part to the use of Robert for the life of E, the Remainder to the Right heirs of Robert, and of another third part to the use of Robert for life, the Remainder to E, the Remainder to Richard, &c. and of another third part to the use of A and his Heirs. After which Partition was made betwixt them, and the Land where, &c. was allotted to Richard, who afterwards surrendered to the use of the Plaintiff. It was holden, That Judgement upon this verdict ought not to be given for the Plaintiff, For the Lessee of Robert had the first possession, and that Lease is to begin after the death of E, who was Tenant for life, and when E and he in the Reversion joyn in a Surrender, thereby the estate for life in that third part is extinct in Robert, who hath the Inheritance, and then his Lease took effect for a third Part. So that the Parties here are Tenants in Common, betwixt whom Trespass doth not ly.

Hil. 31. Eliz. in the Kings Bench.

C C X L I V . Bulleyn and Graunts Case.

Copyhold.

Devise.

Upon Evidence to a Jury, the Case was, That Henry Bulleyn the Father, was seised of the Land being Copyhold, and had Issue three Sons, Gregory, Henry, and Thomas, and afterwards surrendered to the use of the last Will, and thereby devised the said Land to Joan his Wife for life, the remainder to the said Henry, and the Heirs of his body begotten: Joan dyed, after admittance, Henry dyed without Issue, and afterwards the Lord granted it to Thomas and his Heirs, who surrendered to the use of the Defendant then his Wife for life, and afterwards dyed without Issue: Gregory eldest Son of Henry Bulleyn entred, &c. Coke, When the Father surrendereth to the use of his last Will, thereby all passeth out of him, so as nothing accrueth

eth to the Heir, nor can he have and demand any thing before admittance: Wray. The entry of Gregory is lawfull, and admittance for him is not necessary, for if a Copyholder surrendereth to the use of one for life who is admitted, and dyeth, he in the Reversion may enter without a new Admittance. It was moved by Coke, if this Estate limited to Henry be an Estate tail, or a Fee conditionall. For if it be a Fee simple conditionall, then there cannot be another Estate over: but yet in case of a Devise an Estate may depend upon a Fee simple precedent, but not as a will, but as an Customary Devise. Wray, It is not a conditionall Estate in fee, but an Estate tail. Coke, They who would prove the Custome to entail Copyhold Land within a Maner, it is not sufficient to shew Copies of Grants to persons and the Heires of their bodies, but they ought to shew that surrenders made by such persons have been avoided by reason of such matter. Wray, That is not so, for Customary Lands may be granted in tail, and yet no surrenders have been made within time of memory.

Copyhold Estate.

March 31st. In the King's Bench. Collected by the said

Matthew and Haffalls Case.

Is an Ejectio[n]e firmæ, betwixt Matthew and Hassall, the Plaintiff had Judgment to recover, and the Defendant brought a ~~Writ~~ of Error, and assigned Error in this, that the Judgment was entered, Quod querens recuperet possessionem, &c. where it should be (Terminum) vent. in ten. predict. See 9 Eliz. Dyer 258. Coke contrary, That the Judgment is good enough, for the ~~Writ~~ of Execution upon it is Habere facias possessionem, and in a reall Action the ~~Writ~~ is, Quod petens recuperet sesinam, and not terram. And afterwards Judgment was affirmed.

Mr. J. E. Z. in the Kings Bench.

CCXLVI. Tempest and Mallet's Cyclo.

In an Action of Trespass by Tempest against Mallet, Judgment was given, and Error brought: and assigned for Error, that whereas the Action was brought against four, one of them dyed, Mesme between the Award of the Nisi prius, and the Inquest taken. And it was said on the part of the Defendant in the Verdict of Error which was entered upon the Record, that the Plaintiff shewed unto the Court the death of one of the Defendants, and prayed Judgment against the others. See 4 H. 7. 2 Eliz. 155. And there is a difference, where in an Action of Trespass there is but one Defendant, and where many. Another Error was assigned, the Defendant Obulic se per Higgins Attornat. suum, without shewing his Christian Name, as John, or William, for Higgins onely without the Christian Name, is not any Name, for it is but an addition to shew, whiche John, or William. Coke. The same is helped by the Statute of 42 H 8 cap. 30. Where it is enacted, that after Verdict, Judgment shall be given notwithstanding the lack of Warrant of Attorney of the party agaist whom the Issue shall be tried, or any default or negligence of any the parties, their Counsellors or Attorneys, and of necessity this default here in the Christian Name ought to be the fault of one of them. See also 18 Eliz. Cap. 14. for want of any Warrant of Attorney, &c. Glanvil. The Statute provides for default of Warrant of Attorney, &c. Then (Coke) To what end was the Statute of 18 Eliz. made? for the Statute of 32 H 8. provides for defects of Warrants of Attorney. Glanvill. The first Statute provides for Warrants of Attorneyss of such persons against whom

in whom the Issue was tried, but the later Statute is general. Another Error was assigned, Quod defendant Capitur, where the Defence, & so the Fine is pardoned by Parliament, and therefore the entry of the Judgment ought to be, Sic de fine nihil, quia perdonatur. Coke, The Judgment is well enough, for in every generall Pardon some persons are excepted, & it doth not appear if the Defendant here were one of them, and then the Fine is not pardoned, for the Court cannot take notice of that, as it was holden in Serjeant Harris Case: but if the Defendant be charged with the Fine, then he ought to plead the pardon, and to shew that he was not any of the persons excepted. And afterwards at another day the Defendant did alledge, that there was a Warrant of Attorney in the Common Pleas. And also it appeareth upon Record, that the Defendant did appeare upon the Supersedeas by Attorney, who had his full Name, and therefore prayed a Certiorare de novo, to certifie the same matter, vide 9 E. 4. 32. Wray, A Case here greatly debated betwixt the Lord Norreys and Braybrook, and upon a Devise such a Writ of Error was granted after the Plaintiff had pleaded In nullo est erratum; for this Plea, in nullo est erratum, goes but to that which is contained within the body of the Record, and not unto collateral matter, scil. Warrant of Attorneys: And afterwards the Writ of Error was allowed, and upon the day of return thereof, it appeared upon the Record of Supersedeas, that the Defendant did appear by such a one his Attorney: But it was said by the Court, that there ought to be two appearances, the one upon the Supersedeas, and the other when the Plaintiff declares, See as to the name of the Attorney, Trelly's Case, 1 Mar. Dyer 93.

Hil. 31 Eyz. in the Kings Bench.

CCXLVII. Palmer and Knowllis Case.

Execution.
apies after
legit. Palmer recovered Debt against Knowllis, and sued Execution by Elegit, upon which the Sheriff returned, that he had made partition of the lands of the Defendant by the Wath of twelve men, but he could not deliver it to the party, for it is extended to another upon a Statute, upon which the Plaintiff sued a Capias ad satisfaciendum. And now came the Defendant by his Counsell, and moved that after Elegit returned, the Plaintiff could not resort to the Execution by Capias, and therefore prayed a Supersedeas; because the Capias erronie emanavit. But the whole Court was clear to the contrary, for upon Nihil returned upon Elegit, the Plaintiff shall have a Capias, 17 E. 4. 5, sec. 2. 1 H. 7. 19. A man shall have a Capias after a Fieri facias, or Elegit, 34 H. 6. 20. and here the speciall return doth amount to as much, as if the Sheriff had returned Nihil: also the Statute of West. 2. which giveth the Elegit, is not in the Negative, and therefore it shall not take away the Execution which was at the Common Law. And here is no Execution returned, for after the former extent ended, he ought to have a new Elegit; which Wray granted: and afterwards the said Knowllis was taken by force of the Capias ad satisfaciend. and came into Court in the Custody of the Sheriff, and the Case was opened, and in the whole appeared to be worthy of labour; but by the Law he could not be helped, and although he instantly prayed a Supersedeas, yet the same was denied unto him.

Hil.

Hill. 31. Eliz. In the Common Pleas.

C C X L V I I I . The Church-wardens of Fetherstones Case.

A n Action of Trespass was brought by the Churchwardens of Fetherstone in the County of Norfolk, and declared That the Defendant took out of the said Church a Bell, and declared, That the Trespass was done 20 Eliz. And it was found for the Plaintiffs. And now it was moved by Godfrey in arrest of Judgement, That it is apparent upon the Declarations, That the Trespass was done in the time of their Predecessors, of which the Successors cannot have action: and actio personalis moritur cum persona. See 19 H. 6. 66. But the old Churchwardens shall have the action. Cook contrary, and that the present Churchwardens shall have the action, and that in respect of their office, which the Court granted. And by Gawdy Churchwardens are a Corporation by the Common Law. See 12 H. 7. 28. by Frowick That the New Churchwardens shall not have an action upon such a Trespass done to their Predecessors, contrary by Yaxley. See by Newton and Pulton, That the Executors of the Guardian in whose time the Trespass was done shall have Trespass.

March 31. Eliz. In the Kings Bench.

C C X L I X . Hauxwood and Husbands Case.

I n an action upon the Case, the Plaintiff declared for disturbing of him to use his common, &c. and shewing, That A. was seised of certain lands, to which this Common was appendant, for the term of his Life, the余
remainder to B in tail, and that the said A and B did demise unto him the said Lands for years, &c. Pepper, The Declaration is not good, for it is not shewed how these particular estates did commence. See 20 E. 4. 16. By Pigot, secondly, Lessee for life cannot prescribe, and he, and he in the余
remainder, cannot prescribe together; and he in the Remainder cannot have common: Also he declares, That Tenant for life, and he in the Remainder, per demised to him, whereas in truth it is the demise of Tenant for life, and the Confirmation of him in the Remainder, also he doth not aver the life of Tenant for life. Popham, He needs not to shew the commencement of the particular estates, for we are a stranger to them, the Prescription in them both is well enough, for all is but one estate, and the Lease of both. See 27 H. 8. 13. The Lessee for life, and he in the Reversion made a lease for life, and joyned in an action of waste, and there needs no averment of the life of the Tenant for life, for he in the Reversion hath joyned, which Gawdy grants as to all. And said, The particular estates are but as conveyance unto the action. Wray conceived the first Exception to be material, &c.

Term 31. Eliz. In the Kings Bench.

C C L . Sweeper and Randals Case, Rot. 770

I n an action of Trespass for breaking of his Close, and carrying away of his goods, by Sweeper against Randal, upon Not guilty pleaded. The Jury found, That one John Gilbert was seised of the Land, where, &c. and leased the same to the Plaintiff at Will, who sowed the Land, and afterwards the Plaintiff agreed with the said Gilbert, to surrender to him the said

Land, and his interest in the same; and the said Gilbert entered, and leased to the Defendant, who took the Corn. It was moved, If these words, I agree to surrender my Lands, be a present and expresse surrender. Gawdy, It is not any surrender, for Tenant at will cannot surrender, but it is but a relinquishing of the estate, if it be any thing, but in truth it is not any thing in present, but as it to be done in future. Wray, I agree. A demise the Sparrow of D at will, it is no Lease, no more shall it be here any Survivor, or any relinquishing of the estate. Clench conceives, That the intent of the Parties was, to leave his estate at the time of the speaking, otherwise those words were void, for he might leave it at any time without those words. Gawdy, If such was his intent, the Jury ought to find it expressly; and afterwards Judgement was given for the Plaintiff.

Trin. 31. Eliz. in the Kings Bench.

C C L I. Ward and Blunts Case.

Trover and
Conversion.

In an Action upon the Case of Trover of certain Loads of Corn at Henden in Middlesex, and the conversion of them; The Defendant pleaded, That before the conversion, he was seised of certain Lands called Harminglow in the County of Essex, and that the Corn whereof, &c. was there growing, and that he did sever it, by force of which he was possessed, and the same casually lost; and that the same came to the hands of the Plaintiff, and the Plaintiff casually lost the same, and the same came to the hands of the Defendant at Henden, aforesaid, and he did convert the same to his own use, as it was lawfull for him to do: upon which the Plaintiff did demur in Law. Atkinson, The Plea is good, for the conversion is the point of the action, and the effect of it. For if a man take the same, and do not convert, he is not guilty. And here the Defendant doth justifie the conversion, wherefore, he cannot plead, Not guilty. The generall issue is to be taken where a man hath not any colour, but here the Defendant hath colour, because the corn whereof, &c. was growing upon his Land, which might enveigle the lay people, and therefore it is safest, to plead the special matter. But admit, that it doth amount but to the generall issue; yet there is not any cause of Demurrer, but the Plaintiff ought to shew the same to the Court, and pray, that the generall issue be entered; and the Court ex officio ought, to do it. Egerton, the Queen's Solicitor, contrary. The Plea in Bar is not good, The Plaintiff declares of a Trover of his goods, ut de bonis suis propriis, and the Defendant pleads, That he took his own goods, which is not any answer to the Plaintiff. See 22 E 3, 18. In trespass of taking and carrying away of his Trees, The Defendant pleads, That they were our Trees, growing in our own soil, and we cut them and carried them away, and the plea is challenged, therefore the Defendant pleaded over, without that that he took the Trees of the Plaintiff. So 26 Ass. 22. and 30 E 3, 22. Another matter was, The Plea in Bar is, That before the time of the Conversion, The Defendant was seised of the Land, and sowed it; and that after the Corn was severed, (but he doth not say that he was seised at the time of the severance) and then it might be that he had severed the corn of the Plaintiff, &c. and that was holden by the Court to be a material exception, wherefore Judgement was given for the Plaintiff: But as to the first Exception, the same was disallowed, for the Court ex Officio, in such case ought to cause the general issue to be entered, but the Plaintiff ought not to demur upon it.

Trin. 31. Eliz. In the Kings Bench.

CCLIV. Cheiny and Langley's Case, Hill. 31. Eliz. Rot. 638.

The case was, That Tenant for life of certain Lands leased the same for years by Indenture, with these words; I give, grant, bargain, and sell my interest in such Lands for twenty years, To have and to hold, in such manner, and form as I my self did hold the same, and no otherwise, Tenant for life dyed within the Term, and he in the Reversion entred, and the Lessee brought an action of Covenant. Godfrey, The action doth not lie, for here is not any warranty, for the Plaintiff is not Lessee, but Assignee, to whom this Warranty in Law cannot extend; but admit that the warranty doth extend to the Plaintiff, yet it is now determined with the estate of the Tenant for life, and so the Covenant ended with the estate. See 32 H. 6. 32. by Littleton 9. Eliz. Dyer 257. And if Tenant in tail make a Lease for years (ut supra) and afterwards dieth without issue, the covenant is gone; and after Judgement was given against the Plaintiff.

Leases.

Covenant.

Trin. 31. Eliz. in the Kings Bench.

CCLV. Fish, Brown, and Sadlers Case, Instrat. Mich.
29. Eliz. Rot. 606.

A ^{Action upon the Case was brought by Fish and Brown against Sadler, Action upon} Hill. 29. Eliz. rot. 606. and they declared, That they were proprie^{ties of certain goods, which were in the possession of one A against which} A Sadler one of the Defendants had commenced a feigned and covenanted suit in the Ecclesiastical Court in the Name of one Collison, to the intent to get the said goods into his possession, of which the Plaintiffs having notice, and to the intent that the said Plaintiffs should suffer the Defendant to recover and obtain the said goods by the said suit; the Defendant did promise to the Plaintiffs to render to them a true account of the said goods; and shewed further, That by the said suit the Defendant did obtain the said goods by subs^{terance of the Plaintiff.} Tanfield, It is a good consideration, the Plaintiffs were not parties or Privies at the beginning of the suit, and it is not like Onlies case in 19. Eliz. Dyer 355. Where in an action upon the Case Onlie declared, That the Defendant Countess, &c. being a Widow, had divers suits and busineses, and that the Plaintiff at her request had bestowed great labour and travail, and had expended circa the affairs of the said Com^{petit} 1500 l. Whereupon she promised to the Plaintiff to pay all the said ex^{pences, and such a sum above for that matter, which is the ground of the a}ction, is maintenance, and malum prohibitum, but such matter is not here; for it is lawfull for a man to use means to get his goods. Gwdy, All covins are abhorred in Law, and here the Plaintiffs are privies to the wrong, and ther^{fore}, it cannot be any consideration. Wray, Although that the suit at the beginning was wrongfull and covenanted, yet when the Plaintiffs who were owners of the said goods do assent to such proceedings now the suit is become just and lawful ab inicio; and so no wrong in the consideration, but all the wrong is purged by the agreement. If any covin be; the same is between Sadler and him who is sued, to whom the Plaintiffs are not privies. Clench, If this privy betwixt the Plaintiffs and Sadler had been before the said suit; so the consideration is without any fraud. Cooper Herjeant con^{tra}dicted here is not any good consideration, upon which the Promise of the

Assumption and
consideration.

Covin

Defendant

S How and Conneys
Case:

Defendant may be grounded, for the Defendant hath not any benefit by it, and he cited the case between Smith and Smith 25 Eliz. Egerton, Here the consideration is good enough, for the plaintiffs forbear their own suit which was a hinderance unto them. Clench was of opinion, that the Plaintiff should not have Judgement, for that suit was begun by Sadler in the Name of Collison without his privity, and therefore it was unlawfull, and the same was for the goods of another man, which is unlawfull also, and then when the unlawfull act is begun, the illegall agreement afterwards that they shall proceed is unlawful also, and therefore there cannot be any consideration: and as to the covin, it is not material, for without that, the matter is illegal enough. Also the Declaration is not good in this, because it is not shewed in what Court the suit did depend, so as it might appear unto us, that they had power to hold plea of it; Gawdy agreed with Clench in the first point, and also in the last, and by him, in the assumpſt, the Plaintiff declares, that a suit was depending betwixt the Defendant and another, and where the Plaintiffs if they were produced might have given strong witness against the Defendant, the said Defendant in consideration that the Plaintiffs would not give Testimony against him, promised to give to the Plaintiffs 20l. the same consideration will not maintain this action; because it is unlawful for any man to suppresse testimony in any cause. Wray, Here is a consideration good enough, for where Sadler should loose costs upon the first suit, now uppon this promise upon his account he shall be allowed the same, the which is a benefit unto him: and as to the shewing in what Court the suit doth depend, that needs not by way of Declaration, but the same shall be shewed by way of Evidence, and it is not traversable, and it is but inducement to the action. And as to the covin, that is not here, for covin is alwaies to the prejudice of a third perlon, but so it is not here: But in truth this suit was unlawfull, for Sadler so to sue in the Name of another, and therefore it cannot be a good consideration. And soz that cause, it was awarded, Quod querens nihil capiat per billam.

Trin. 31. Eliz. in the Kings Bench.

C C L I V. Howe and Connyes Case.

Trespass.

In an action of Trespass by Howe against Conney, the case was, That lone Smith was seized of two houses, and leased one of them to his brother for life, and afterwards by his Will devised, viz. I give to my Executors, All my Lands and Tenements free and copyy, to hold to them, and they to take the profits of them for ten years, and afterwards to sell the said Lands and Tenements; and afterwards dyed, his brother dyed before the quarter of a year after: and it was found, That the Executors entered into the house undemised, and took the profits, but not into the other, and that at the end of the said ten years, they sold the whole. Godfrey, The house only which was in possession, shall passe by the will. (To hold unto them) doth imply matter of possession, so as nothing passeth but that wheresof they may take the profits, the which cannot be of a bare Reversion, also by this devise, the Executors have not interest in the thing devised but for ten years, whereas the brother of the Testator had an estate for life, which by possibility might continue above twenty years, and to prove that the meaning of the devise to be collected upon the words of the Will ought to direct the construction of the Will, he cited Chicks case, 19 Eliz. 357. and 23 Eliz. 371. Dyer. At another day it was argued by Cook, That both the Houses passe, and the words (take the profit) do not restrain the general words before, (viz. All my Lands and Tenements) but rather expounds them, sci. such profits that they might take

Devise.

take of a Reversion, cum acciderit, for it may be that the brother shall dye within the ten years. And he cited the case 34 H. 6. 6. A man seised of diverse Reversions upon estates for life, devise them by the name of omnium terrarum & tenementorum, which were in his own hands, and by those perols, the Reversion did pass, and yet the Reversion (to speak properly) was not in his hands: and if the brother had dyed in the life of the devisor, they had clearly passed, and then his death or life shall not alter the case. And he resembled the case to the case in 39 E. 3. 21. The King grants to the Abbot of Redding, That in time of vacation the Prior and Monks shall have the disposition of all the possessions of the said Abbey ad sustentationem Prioris & Monachorum, and if in the time of vacation they shall have the Abbowsions, was the question, for it was said, That abbowsions could not be to their sustentation, but yet by the better opinion the grant of the King did extend to Abbowsions, for it shall be intended such sustentation as Abbowsions might give. Godfrey, Dur Case is not like to the case of 34 H. 6. for there the Devisor had not any thing in possession, therefore if the Reversion did not passe, the devise should be utterly void. Gaudy conceived that the house in possession only passed, for the devise extends to such things only, whereof the profits might be taken, but here is not any profit of a Reversion. Clench, and Wray contrary. The intent of the devise was to perform the Will of his Father, and also of his own Will, and in case, the house in possession was not sufficient to perform both the Wills all shall passe, and therefore the devise by favorable construction is to be taken largely, so as the wills might be througely performed, and also the devise is general, and further all his Lands and tenements, which are not restrained by the subsequent words (to take the profits) for to have and to hold, and to have and to take the profits is all one.

Trin. 31 Elix. In the Kings Bench.

CCLV. Slugge, and the Bishop of Landaff's Case.

Slugge libelled against the Bishop of Landaff in the Ecclesiastical Court, because where he was presented by the Dean and Chapter of Gloucester to the Church of Penner, the Bishop did refuse to admit him, and now the Bishop had a Prohibition, and hevel, Quod non habetur talis Rectoria cum cura animarum in eadem diocesi, sed perpetua vicaria. And by Popham a Prohi-
bition doth not lye, but the matter ought to be determined in the Ecclesiasti-
call Court, and when he who is presented to the same Church, whether it be
a Church or not, shall be tryed in an action of trespass, and the like matter was
ruled, Mich. 14. Eliz. betwixt Welton and Grendon, who was presented by
the Queen, and it was holden, that because institution and admission do be-
long to the Ecclesiastical Court, and not to the Kings Court, that no Pro-
hibition should lye, and therfore he prayed a consultation. And note, That
the Defendant in the Prohibition did not denie formall upon the suggestion
for the Judges use, if the suggestion be not sufficient to maintain the Prohibi-
tion, to grant a consultation without any formall demurrer upon the sugges-
tion, if the insufficiency of the Suggestion be manifest, which was gran-
ted by the whole Court. Cook, That a Consultation ought not to be gra-
nted, for whether there be such a Rectory or not shall be tryed here. So 2 H.
4. 30. Prior or not Prior, 49 E. 3. 17, 18. Wise, or not Wise, but never
acquainted in loyal matrimony by the Bishop, 44 E. 3. So within or without
the Parish, 50 E. 3. 20. So, 45 E. 3. Quare Impedit, 138. In a Quare Impe-
dit, no such Church within the County. Afterwards, at another day, Popham
put the case, Slugge was presented to the vicaridge of Penner, the Bishop re-
fused to admit him, and admitted one Morgan Blethen unto the Parsonage

Tryal.

of Penner, at the presentment of the Lord St. John; Slugge sued the Bishop for contumacy, per duplum querelam. The Bishop said, Non habetur talis vicaria, upon which matter he sued a Prohibition, and he concelved, That the Prohibition did not lie, for a Vicar is but he, that gerit vicem Personæ, to supply his place in his absence, so as the same is a spiritual matter which ought not to be tryed here, also the libel is, to have admission and justification, and the other matter ariseth by their Plea, sci. Quod Rectoria de Penner est Ecclesia cum cura animaram, absque hoc quod habetur talis Vicaria, and so it is but an incident to the principal matter, wherefore it shall be tryed there, and he prayed a Consultation. Cook, We have shewed, That in the time of E. 3. one L was seised of the Mandate of Penner, to which the Church of Penner is appendant; and we alledge presentments from that time, and we convey it to the Lord St. John, which now is, and they would now defeat us by this surmise, That there is no such Church with cure of souls, which is tryable here. Popham the libel doth contain nothing but contumacy in the Bishop, in that he hath not admitted Slugge, and the other matter comes in the Replication, and afterwards by assent of the parties a Consultation was granted, quoad institutionem of Slugge only, but that they should not proceed further.

Pscb. 31. Eliz. Rot. 154 In the Kings Bench.

C C L V I. Fennick and Mitfords Case.

The Case was, A man seised of Lands in Fee, levieth a Fine to the use of his wife for life, the remainder to the use of his eldest son, and the heirs males of his body, the Remainder to the use of the right heirs of the Conuso, The Conuso makes Lease for a thousand years to B. the eldest Son dyeth without issue male, having issue a daughter, the Conuso dyeth, the wife afterwards dyeth, the eldest son enters and leaseth the Lands to the Plaintiff. Atkinson, That upon this conveyance a Reversion, was left in the Conuso, although by the fine all is conveyed out of the Conuso; and so (as it hath been objected) the use limited to the right heirs of the Conuso, is a new thing: For it is to be obserued, When a man is seised of Lands, he hath two things, the Land, or the Estate, and secondly the use which is the profits, and if he make a Feoffment without consideration, by that the estate and possession passeth, but not the use, wherefore the use descends after to the Son and Heir. And in our case if the wife and Son had died without issue in the life of the Father, all should be in the Father and his heirs. And if a man make a Feoffment in Fee, unto the use of his last will, it shall be unto the use of the Feoffor, and his Heirs, and in our case, this limitation to the Right Heirs of the Conuso is, as if no mention had been made of it, and then it should be to the Father, and his heirs. And afterwards it was adjudged, That it was a Reversion, and no Remainder, and by Gawdy, This Limitation, To his Right Heirs, is merely void, Wray, As if he had made a Feoffment to the use of one for life, without further Limitation.

Hill. 31. Eliz. Rot. 723. in the Kings Bench:

CCLVII. Holland and Franklins Case.

In a Replevin, the Defendant made Consuls as Bayliff to Thomas Lord Howard, and therew^t, how that the Prior of Holliwell was seised of the Replevin. Pannour of Prior in her demesnes as of Fee, &c. and 4 Nov. 19 H. 8. by Deed enrolled sold unto the Lord Audley, the said Pannour, who dyed, having issue a Daughter, who took to Husband, Thomas late Duke of Norfolk, who had issue the said Lord Howard, and that after their death the said Pannour descended, &c. The Plaintiff in bar of the consuls heined, That the said Deed was primo deliberatum, 4 Nov. 30 H. 8. And that mean be-^twix the date and the delivery, scilicet 12 October, The said Prioresse leases the said Pannour to one A. for ninety nine years, and conveyed the Term to the Plaintiff, absque hoc, that the Prioresse bargained and sold the said Pannour to the Lord Audley, ante dimissionem predicti dicti A. fact. upon which there was a Demurrer. Cook, This Averment of another delivery than Averment the Deed doth purpozt against the Deed enrolled, shall not be received, no more then a man may aver. That a Recognisance was acknowledged at another day, &c. for every Record imports a truth in it, and erprett a verment shall not be received against it, but a man may confess and avoid; See 7 H. 7. 4. It cannot be assigned for error, that in a Recdissell, the Sheriff non accessit ad tenementa, as he hath refuted for that is against his Return which is Recorded, and the date of the Record is the principal part of it, which see 37 H. 6. 21. by all the Justices, That matter of Record hath alwaies relation to the date, and not to the Delivery, contrary of a Deed which is not of Record, for the same shall have relation alwaies to the delivery, and See 39 H. 6. 32. by all the Justices averment ag. inst a deed enrolled that it was not delivered shall not be received, so in the Case betwixt Ludford and Gretton, 19 Deeds. Relation & Records and Deeds. Eliz. Plow. 1. 49. It is holden by all the Justices, That the Kings Charter hath relation to the time of the date, because that matters of Record carry in them by presumption of Law for the Highness of them, truth, and therfore one cannot say, That such a Charter was made or delivered at another day, then at that at which it bears date, So of a Recognizance, Statute, &c. but ag. against Letters Patents a man may say, Non concessit, for he hays nothing passeth thereby, and then it is not contrary to the Record. Atkinson contra-^r, I confess that the party himself (whose deed it was) cannot take a direc-^r Averment. averment against a deed enrolled, but he may confess and avoid it, so as he leave it a Record, as if a fine be levied by another in my name of my Land, I am bound by it, but if the fine were levied by another in my name I am not bound, for I may confess and avoid it, and yet leave the Record good, but here the Plaintiff is a stranger to his deed enrolled: And some Records shall bind all persons, as certificates of Battalions, &c. so all may give evidence in such case, 2 H. 5. Estoppel 91. A makes a Feofment in fee and afterwards before the Coronet confesseth a Felony supposed to be done before the Feofment, the Feoffee shall have an averment against it. Egerton the Queens Solicitor, contrary, Patter of Record cannot be gainsaid in the point, or in matter of implication, and therfore ag. inst that he cannot say, Non est factum, 16 E. 3. Abb. 13. A deed enrolled in pais, cannot be denied, 24 E. 3. 64. A Deed enrolled is not a Record, but a thing recorded, which cannot be denied. And here this plea is a violent averment against the deed so it amounts to as much as if he had said, Not his deed at the time of the Enrolment: But I confess that such a deed may be avoided, by a thing which stands with the deed by matter, out of the deed. If hath been objected,

That

That this acknowledging of the deed ought to be made by Attorney, and therefore made in person it is not any acknowledgement, and so against such acknowledgement. Non est factum may be pleaded, and a fine or confession in a writ of annuity upon prescription, or in assise shall binde the house. See 16 E. 3, Abb. 13. That a fine, Recognizance, and Covenant of Record shall binde the House in such case. And the acknowledgement of the Prudesse alone will serve in this Case, for the Huns are as dead persons, And posito, that a Master of the Chancery comes into the chapter-house, and receives such an acknowledgement, I conceive that it is good enough: It hath been objected, That here the Plaintiff is not estopped to take the averment, because we have not pleaded our matter by way of Estoppel: certainly the same needs not here, for the Record it self carries the Estoppel with it, and the truth appeareth by the Record, and the Court ought to take hold of it. Godfrey contrary, A deed enrolled may be avoided by matter, which is not contrary to the Record, as 19 R. 2. Estoppel 281. in sur cui in vita, a Release of the Mother of the Demandant with warranty was pleaded in bar, and that enrolled. To which the Demandant said, That at the time of the Release supposed to be made; our mother had a husband, one F., and so the Deed was void, and so avoided the deed by matter Debors, scil. Coverture, so of ensancy, but not by a generall averment: A man not lettered shall avoid a deed enrolled by such special matter, so, an obligation made against the Statute of 23 H. 6. and these special matters shall utterly avoid the deeds against whom they are pleaded, but in our case we do confess the deed to be good to some intent, scil. after our Lease expired, for which our case is the better case. And at another day it was objected, That the deed could not be acknowledged without a Letter of Attorney, being a Corporation, which consisted upon divers persons as Priors and covent, and they are alwaies to be intended to be in their chapter-house, and cannot come into Court to acknowledge a Deed. To which it was answered by Cook, That this acknowledgement being generally pleaded, it shall be intended, that it was done by a Lawfull means, and there is no doubt, but that such a Corporation may levy a fine, and make a Letter of Attorney to acknowledge it, and see, 2 Ma. Fulmerstons case 105. It was further objected, That this Deed was enrolled the same day that it beareth date, for the pleading is per factum suum gerens Datum, 2 Novemb. 29 Hen. 8. et iisdem die & anno irrotulat. And by the Statute such a deed ought to be enrolled within six moneths next after the date, so as the day of the date is excluded, and so it is not enrolled within the six months: as to that it was answered by Cook, That the time of computation doth begin presently after the delivery of the deed, as in the common Cases of Leases, If a man makes a Lease for years to begin from the day of the date, the same is exclusive, but if it be to have and to hold from the date of the deed, it shall begin presently. And an Execution supposed the same day is good, and then here, this Enrollment is within the six moneths; and yet see 5 Eliz. 128. Dyer Pophams case. It was also objected, That it is alledged in the consuls, That the Mariner was sold to the Lord Audley, and that the Deed of Bargain and Sale was acknowledged and enrolled in the Chancery, the said Lord being then Lord Chanceler, and he cannot take an acknowledgement of a Deed, or enrollment of it to himself, for he is the sole Judge in the said Court, so as the deed is acknowledged before himself, and enrolled before himself, and that is good enough, for here we are not upon the common Law, but upon the Statute, and here the words of the Statute are performed. And the enrollment of the Deed is not the substance of the Deed, but the deed it self. Also the acknowledgement of the Deed, after it is enrolled is not material for he is estopped to say that it is not acknowledged. And as to the matter it self, a man shall not have averment against

the purport of a Record, but against the operation of a Record, as not put in being, not compassed, partes ad finem nihil haberunt, &c. And against Wotters' Patents of the King, Non concessit, is a good plea, which see 18. Eliz. for by such plea it is agreed, that it is a Record, but that nihil operatur, and that the King has no right to the same.

Mich. 31. Eliz. in the Kings Bench. Rot. 258.

CCLVIII. Osborn and Kirtons Case.

Debt upon an Obligation, The Defendant cast a Protection, upon which the Plaintiff did demur. Tanfield, The Protection is not good, for the Defendant is let to Bail, and so is intended alwayes in prison, for so the Record makes mention, and then the Protection quia moratur in portibus, Zeland is against the Record, and the Court ought to give credit to Records especially, secondly the words of the Protection are, That Kirton is employed in Obsequio nostro, which is no cause of protection, for the usual form (and so is the Law) that such a person be employed in negotio Regni, for the defence of Englands &c. for if the King will give aid unto another Persons Subjects employed in such service, he shall not have Protection. And afterwards variance was objected betwixt the Will and Declaration, and the Protection, for the Will is against John Kirton of A Gentleman, and the Protection is John Kirton only. But the same was holden no such variance being only in the Addition, for before the Statute 1 H. 5. additions were not necessary in any actions.

Debt.

Protection.

Hil. 30 Eliz. Rot. 156. in the Kings Bench.

CCLIX. Bopton and Andrews Case.

Debt.

Debt upon an Obligation, the Condition was, to make sufficient assurance of certain Lands to the Obligee before the tenth day of March 17 Eliz. And if it fortune the said Obligee be unwilling to receive, or mislike such assurance, but shall make Request to have one hundred pounds for satisfaction thereof. Then if upon such Request, the Obligo pay one hundred pounds within five moneths, That then the Obligation shall be void. And at the day, the Obligee doth refuse the assurance, and afterwards 27 Eliz. request is made to have the hundred pounds, It was the clear opinion of the whole Court, That the said Request was well enough for the time, and he might make it at any time during his life, and he is not restrained to make it before the day in which the Assurance is to be made, and afterwards Judgment was given for the Plaintiff.

Mich. 29. & 30. Eliz. Rot. 546. In the Kings Bench.

CCLX. Knight and Savages Case.

Error.

In a writ of Error was brought upon a Judgement given in Leicester in Debt, Tanfield assigned error, because in that Suit there was not any plaint, and in all inferior Courts, the plaint is as the original at the common Law, and without that no process can issue forth. And hereupon the Record nothing is entred but that the Defendant somonitus fuit, &c. and therefore the first entry ought to be A. B. queritur adversus, C. &c.

§ Kirby and Woodshaw and
§ Eccles Case. Fulmerstones Case:

Clench, A Plaintiff ought to be entered before process issued, and the summons which is entered here, is not any plaint, and for that cause the Judgement was reversed: It was said, That after the Defendant appeared, a Plaintiff was entered, but it was laid by the Court, That that shall not mend the matter, for there ought to be a plaint out of which the process shall issue, as in the Courts above out of the original Writs.

Trin. 31 Eliz. In the Kings Bench.

C C L X I. Kirby and Eccles Case.

In an action upon the Case the Plaintiff declared, Quod cum quendam communicatio fuisse inter the Plaintiff, and one Cowper, That Cowper, should make certain Hogs for the Plaintiff, the Defendant did promise, That in consideration, that the Plaintiff should give unto the Defendant three Shillings and four pence, for the fatting of every Hog, That the said Hogs should be redelivered to him well fatted; to which promise and warranty, the Plaintiff giving faith, delivered to the said Cowper one hundred and fifty Hogs to be marked; and that one hundred of them were delivered back, but the residue were not: It was moved, That here is not any consideration for which the Defendant should be charged with any promise: but it was argued, on the other side, That the Promise was the cause of the Contract, and being made at the time of the Communication and contract, should charge the Defendant, but if the promise were at another time, it should be otherwise. There was a Case lately betwixt Smith and Edmonds, Two Merchants, being reciprocally indebted the one to the other, agreed betwixt themselves to deliver all their Bills and Bonds into the hands of one Smith, who promised that he would not deliver them to the parties until all accounts were ended betwixt them; and yet he did deliver them, and soz that an action brought against him was adjudged maintainable: yet there was not any consideration, nor was it material, for the action is grounded upon the Deceit, and so is it here, upon the Warranty: and of that opinion were Clench and Wray, Justices, but Gawdy was of a contrary opinion.

Hil. 30 Eliz. Rot. 6, 9. In the Kings Bench.

C C L X II. Woodshaw and Fulmerstones Case.

Woodshaw, Executor of Heywood, brought Debt upon a Bond against Richard Fulmerstone, and the Writ was dated October Mich. 29. & 30. Eliz. and the Condition of the Bond was, That if Fulmerstone dyed before his age of one and twenty years, and before that he had made a Journey to his Wife, daughter of the Testator Heywood, Then if the said Defendant caused one hundred pounds to be payed to the said Heywood, within three moneths after the death of the said William, that then the Bond should be void, and the said William Fulmerstone dyed 30. Septem. 30 Eliz. which matter he is ready, &c. The Plaintiff doth traverse, abique hoc, that the said Heywood dyed intestate. Tanfield, It appeareth of Record that the Plaintiff hath not cause of action, for this one hundred pounds, was to be paid within three Moneths after the death of William Fulmerstone, as the defendant hath alledged, which is also confessed by the Plaintiff, and this action is entered Mich. October 30. Eliz. scilicet within a moneth after the death of William Fulmerstone, and so before the Plaintiff hath cause of action, and therefore he shall be barred. Gawdy, Where it appeareth to the Court, that the plain-

Plaintiff hath not cause of action, he shall never have Judgement, as in the Case betwixt Tilly and Worddy, 7 E 4, but here it doth appear that the Plaintiff hath cause of action, for where a man is bound in an obligation, the same is a duty presentlie, and the condition is but in defeasance of it, which the Defendant may plead in his discharge.

Trinit. 31. Eliz. In the Kings Bench.

CCL XIII. Windham and Sir Edward Cleers Case.

Roger Windham brought an action upon the Case against Sir Edward, declared that the said Ed. being a Justice of Peace in the County of N. and where the Plaintiff was a lopall subject, and of good fame all his life time, nor never touched, or reproached with any offence of Robbery &c. the Defendant, malicious & invide machinans ipsum Rogerum, de bonis nomine, fama et vita depravare, directed his warrant to divers Bayliffs & Constables of the said County to arrest the said Plaintiff: and it was alledged in the said warrant, That the Plaintiff was accused before him of the stealing of the horse of A. B. by reason of which the Plaintiff was arrested, and so detained untill he had entered into a Bond for his appearance, &c. whereas in truth, he was never accused thereof, nor ever stole such horse, and whereas the Defendant himself knew that the Plaintiff was guiltless, by reason of which, he was greatly discredited, &c. And it was found for the plaintiff; And it was moved, that upon this matter an action doth not ly, for a Justice of Peace if he suspect any person of felony, or other such offence may direct his warrant to arrest him.

Action upon
the Case of
Slender.

14 H. 8. 15 Gaody and Clench, If a man be accused to a Justice of Peace for felony, for which he directs his warrant to arrest him, although the accusation be false, the Justice of Peace is excused, but if the partie in truth was not accused before the Justice, it is otherwise: It was a Case latele betwixt the Lord Lumley and Foord, where Foord in a letter written by him, has written, It is reported, That my Lord Lumley seeketh my life: If it was not reported, an action upon the Case lyeth, but if reported, no Action lyeth: so here, if he was accused no Action lyeth, but if not, an Action lyeth: And afterwards in the principall Case, Judgment was given for the plaintiff.

Trinit. 31. Eliz. in the Kings Bench.

CCL XIV. Iffley Case.

Iffley and others were plaintiffs in an Ejectione firme, and upon the general issue it was found for the plaintiffs, and 4. dayes after the verdict given, was moved in Stay of Judgment a speciall matter in Law, wherof the Justices were not resolved for the law, but took advisement and gave dayes over, and in the meane time one of the plaintiffs dyed, which matter the defendant returned to the Court in further Day of the Judgment: But by Coke, the time is not any cause, for the Postea came in Quindena Pas. which was 16. Aprille, at which day the Court ought to have given Judgment presentlie, but tooke time to be advised, and the 19. of Aprill, one of the plaintiffs dyed, And the labour of the Court ought not to prejudice us; for the judgment here shall have Relation to the 16. of Aprill, at which time he was alive; and it was so of late adjudged in the Case of Derick James, who dyed the day after the verdict, and yet Judgment was not stayed, for the Court after verdict cannot examine surmises, and they have not day in Court to plead, and in

our case, It was but a day of Grace, and no entry is made of it; Although no plea can be now pleaded after Verdict, yet as amicus curie, one may inform us of such matter. And sometimes in such case, Judgement hath been stayed, as 9 Eliz. and sometimes notwithstanding such Exception as 2 Eliz. So as I conceive the matter is much in the discretion of the Justices, And because the same was a hard verdict, and much against the Evidence, It is good discretion upon this matter to stay Judgement, and such was the opinion of the Court.

Trin 31. Eliz. in the Kings Bench.

CCL X V. Steed and Courtneys Case.

Error.

Entry was brought upon a Fine levied upon a Plaintiff in a suit at Common Law in the City of Exeter. And two Errors were assigned: First, The plaintiff has, quod tenet convent. de duobus tenementis. Whetheras in truth, the word Tenement doth not comprehend any certainty, but in the Word (Tenement) is understood, Messuage, Land, Meadow, pasture, &c. And whatsoever lyeth in tenure: And 11 H. 6. 18. by grant of Lands and Tenements, Kent or Common shall passe. And an Ejecution fierme doth not ly of a Tenement, nor a forcible entry supposed in a Tenement, 11 H. 7. 25. and 38 H. 6. 1. Another error was, because the fine was levied in the Court of the City of Exeter, Which see 44 E 3. 37, 38. Those of Exeter can prescrive to have the Commons: but the same ought to be by special Charter of the King by express words: Egerton the Queens Solicitor, was late under the Justices, and was not of Counsel in the case laid, That he was of Counsel in a case betwixt Bunderby and Bird, where such a fine layes in Chester by prescription was in question, was by a Writ of error reverbited: and afterwards in the principal case the fine was reversed by the said Error.

C CLX VI. Trinit. 31 Eliz. In the Kings Bench.

Devises.

The Case was this, Grandfather, Father, and Son: The Grandfather seised of a house called the Swan in Ipswich, devised the same to his eldest Son for life, the Remainder to A son of his eldest Son, and the heirs males of his body, the Remainder to the right heirs of the Devisee, and to the heirs males of his body, and dyed. The Father and Son dyed without issue male, the Son having issue a Daughter, who entered and allured the Land unto one Hawes, and covenanted, That she was seised of the said Messuage of a certain and sure estate in Fee simple. Godfrey, That the Daughter shall take the last Remainder, as right heir at the time that it ought to be erected, and to the heirs males of her body, as if it had been devised to her by her proper Name, so she hath but an estate tail, and so the covenant is broken. Cook contrary: At the time that the devise took effect by the death of the Devisee, the Father was his Right heir, so as the Remainder reverseth him immediately, and shall not extend in abeyance untill the Father and Son by without heir male of the Son, for the Father is a portioner able to take, so that upon the death of the Devisee, the Father is Tenant for life, the Remainder to the Son, and the heirs males of his body, the Remainder to the Father in tail ut supra, the Reversion to the Father in fee, and the daughter hath the same Reversion by dissent after the Entayles spend; all which Wray Justice granted.

Mich. 31 & 32 Eliz. In the Common Pleas, *Intra*s*: Trim. 31 Eliz.
Rot. 1529.*

CCLXVII. Galliard and Archers Case.

Galliard brought an action upon the Case against Archer. The Plaintiff declared, That he himself was possessed of certain goods, which by tro-^{Conversion.} ther came to the hands of the Defendant, who hath converted them to his own use: The Defendant pleaded, That before the Lawyer supposed, one A was possessed of the said goods as of his proper goods, and sold them to the Defendant, and that he had not any notice, That the said goods were the goods of the Plaintiff, upon which the Plaintiff did demand in Law. And by Anderson the plea is not good, so the Plaintiff may chuse to have his Action against the first tñnder, or against any other, which gets the goods after by Sale, Gift, or Lawyer; And by some, The Defendant having the goods by Sale, might traverse the finding: See Contr. 27 H. 8. 13. s. And sic by some, In detinre where the Plaintiff declares of a Bailment, The Defendant may say, That he found them, and traverse the Bailment, 39 H. 37. by Moile, and by Windham Justice, The Defendant may traverse the property of the Goods in the Plaintiff, 12 H. 4. 11.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXVIII. Edwards and Tedburies case.

Edwards of London was indebted unto one A of the same City, and Edwards delivered goods to one Tedbury Carrier of Exeter, who went to him to carry for him certain wares, to be carried to Exeter, to certain tradesmen there, the said goods to be delivered to them, &c. And so the said goods, wares, and merchandizes, being in the possession of the Defendant Tedbury to be carried to Exeter, the said A caused them to be attached in the hands of the said Carrier, for the Debt of the said Edwards, The said Carrier being then privileged in the Common Pleas, by reason of an action there depending. And by the clear opinion of the whole Court, the said Attachment ought to be dissolved: for the Carrier for the reason aforesaid goods, is privileged in his person, and his goods, and not only in his own goods, whereof the property belongs to him, but also in such goods in his possession by which he is answerable to others, &c. And so it was adjudged.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXIX. Cockshall, and the Mayor, &c. of Boaltons Case.

Henry Cockshall brought an action upon the case against the Mayor, Town-Clark, and Coates of Boalton, in the county of L, and declared, That where he himself had affirmed a plaint of Debt in the Court of the said Town, before the said Mayor, &c. against I. S. and therupon had caused the said J. S. to be arrested, The said Defendants did conspire together to delay the Plaintiff of his said suit, in peril of his debt, had let the said I. S. go at large without taking bail: Petrum Justice conceived, That upon that matter, that the action doth not lie, for the not taking of bail is a judicial act, for which he shall not be impeached, but all the other Justices were strongly of opinion against him, for the not taking of Bail is not the cause of the action, but the conspiracy.

Mich. 31. and 32 Eliz. in the Common Pleas

C C L X X . Erbery and Lattons Case.

In a Replevin, The Defendant doth abow because he is seised of such a Mannor within which there is a Custome That the greater parte of the Tennants at any Court within the said Mannor holden appearing may make By-lawes, for the most profit and best government of the Tenants of the said Mannor &c. and that such By-lawes should binde all the Tennants &c. and shewes further, That at such a Court holden within the said Mannor the Homage there, being the greater part of the Tennants of the Mannor aforesaid, at the Court aforesaid appearing, made this By-lawe, scilicet, That no Tenant of the said Mannor should put into such a Common any steers being a year old or more, upon payne of sir pence for every such offence, and that it should be lawfull to distreyne for the same. And the Court was Cleere of opinion, That the By-law was utterlie void, for it is against Common Right, where a man hath Common for all his Cattell Contionable, to restrayne him to one kind of Cattell, &c. But if the By-lawe had bin, That none shoulde put in his Cattell before such a day, the same had bin good, for such By-law doth not take away, but order the Inheritance; For the nature of a By-law is to put over betwixt the Tenants concerning their assayres within the Mannor which by law they are not compellable to doe: And by Periam, The Abowant ought to have averred, That this By-law was for the Common profit of the Tennants: See the Lord Cromwells Cas. 15. Eliz. Dyer. 322. and afterwards in the Principall Cas, Judgment was given against the Abowant.

Mich. 31. and 32. Eliz. in the Common Pleas.

C C L X I . Wicks and Dennis Case.

Replevin.

Wicks brought a Replevin of Dennis, who abowed, That one Dennis his father was seised of the Mannor &c. and granted it to the abowant a Rent of twenty pounds per annum, and further granted, That if the said Rent be arreate unpaid six dayes after the feasts, &c. wherein it ought to be paid, si licite petatur, That then it should be lawfull to distreyne; The grantor afterward by Indenture Covenanted with the Lord Treasurer and others, to stand seised of the same Mannor, unto the use of himselfe and his heires, until he or his heires have made default in the payment of one hundred pounds per annum, untill three thousand pounds be paid, and after default of payment, to the use of the Queen and her heires, until the summe of three thousand pounds should be paid and levied; The grantor afterward levied a fine to the said Lord Treasurer and others to the uses aforesaid, the Rent is arreare; default of the payment of the hundred pounds is made, Office is found, The Queen seised the land, the Abowant during the possession of the Queen demanded the Rent, and the arreage thereof, The Queen granted over the mannor to Wick and Bosden, and Dennis the grantee did distraim for the cent, and arreages demanded, ut supra, It was moved by Harris, Serjeant That this demand of severall summs payable at severall dayes before, is not good; for every summe ought to be severallie demanded when it was first due, scil. si licite petatur, scil. within the six dayes: for otherwise without such demand, distresse is not lawfull, and hee resembled it to the case of Sir Thomas Gresham 23. Elizabeth Dyer, 372 of severall Tenders. Periam

conceaved that the demand ought to be severall, Anderson, That the demand is good enough, And as to the demand made during the possession of the Queen, It was holden by the whole Court to be good enough; for although the possession of the Queen be privileged, as to the distresse, yet Demand of a right is due, and the possession of the Queen is in right charged with it, and the Rent in Rent-charge during the possession of the King, the partie sueth to the Queen by Petition so; the said Kent; he ought to shew good. in his petition, That he hath demanded the Kent; for if the possession had bin in a Common person, he could not distresyn before demand, nor by consequence have Aisse: And the Kent, notwithstanding the possession of the Queen, is demandable and payable so; to entitle the partie unto Petition against the Queen, and to distresse against the subiect when the possession of the Queen is removed, And see 7 H. 6. 40. distressee may make continuall clayme, although the possession of the Land of which he is disseised be in the King, And 34. H. Br. sciss 48 If the heire at full Age intrude upon the possession of the King, and payes Kent to the Lord of his Land holden of a subiect, the same is a good sciss, and shall bind the heire after he hath sued his liberty 5 E. 4. 4. and see 13 H. 7. 15. That distresse taken upon the possession of the King is not lawfull, but sciss obtained durieng it, is good. So in 21. H. 7. 2.

Mich. 31. and 32 Eliz. in the Com. Pleas. *int.* M. 30. and 31. Rot. 458.

CCLXXII. Ashgells and Dennis Case

A Shegell brought a Quare impedit against Dennis, and the plaintiff Counted Quare impedit
dict. That the defendant had disturbed him to present ad vicarium de D. and of the Abbowson of the Vicarage of D. and by her letters Patents gave unto the plaintiff Rectoriam predictam cum pertinentiis, et etiam vicariam Ecclesie predict. And it was holden by the whole Court, That the abbowson of the vicarage by these words doth not passe; nor so in the Case of a Common person much less in the Case of the King: But if the Queen had granted Ecclesiam suam of D; then, by Walmersey Justice, the abbowson of the vicarage had passed.

Mich. 31. and. 32. Eliz. in the Comyn Pleas.

CCLXXXIII. Collman and Sir Hugh Portmans Case

EJECTIONE FIRMAZ BY COLLMAN AGAINST SIR HUGH PORTMAN IT WAS FOUND BY SPECIAL VERDICT. THAT THE LANDS WHERE WERE HOLDEN BY COPPIE OF THE MANNEZ OF D. WHEREOF SIR H. PORTMAN, WAS SEIZED, AND THAT THE PLAINTIFF WAS COPYHOLDEN IN FEE, AND FURTHER FOUND, THAT THE SAID SIR HUGH, PRETENDING THE SAID COPY-HOLD LANDS TO BE FORFEITED, ENTRED INTO ONE COMMUNICATION WITH COLLMAN TOUCHING THE SAME, UPON WHICH COMMUNICATION IT WAS AGREED BETWEE THEM, THAT THE SAID COLLMAN SHOULD PAY TO THE SAID SIR HUGH FIVE POUNDS, WHICH WAS PAID ACCORDINGLY, AND THAT, IN CONSIDERATION THEREOF, COLLMAN SHOULD ENJOY THE SAID CUSTOMARY LANDS, EXCEPT ONE WOOD CALLED COMBWOOD; SOZ HIS LIFE AND ALLO OF ALICE HIS WIFE, DURANTE SUA VIDUATE, AND THAT COLLMAN SHOULD HAVE ELECTION WHETHER THE SAID LANDS SHOULD BE ASSURED UNTO HIM AND HIS SAID WIFE BY COPY, OR BY WILL, &c. AND HE CHOSE BY WILL, WHICH WAS MADE ACCORDINGLY AND FURTHER FOUND, THAT THE SAID SIR H. HELD AND ENJOYED IN HIS POSSESSION THE SAID WOOD, &c. AND UPON THIS MATTER, THE COURT WAS IN CLEAR OPINION THAT THERE IS A GOOD SURRENDER OF THE SAID LANDS, AND THAT FOR LIFE ONLY, AND THAT THE SAID SIR HUGH HAD THE WOOD DISCHARGED OF THE CUSTOMARY INTEREST.

Surrender of a
Copy-holder

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXXIV. Thetford and Thetfords Case.

In an action of Debt for Rent, the Plaintiff declared, That Land was given to him, and to T. his wife, and to the heirs of their bodies, and that his wife leased the Lands to the Defendant, and that the Dones were dead, and that the Plaintiff as heir, &c. for rent arrear, &c. and upon Non demiserunt, the Jury found that the Husband and Wife demiserunt, by Indenture, and afterwards the husband dyed, and the wife entred, and within the term dyed: Now upon the matter it seemed clear to Anderson, that the Jury have found for the Defendant, scilicet Non demiserunt, for it is now no lease ab initio, because the Plaintiff hath not declared upon a Deed. 1 Ma. Dyer 91. and also the wife by her disagreement to it, and the occupation of the Land, after the death of her Husband, hath made it the Lease of the Husband aliy.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXXV. Rockwood and Rockwoods Case.

Affumpc.

In an action upon the case, the case was this. The Father of the Plaintiff Land Defendant being sick, and in danger of death, and intending to make his Will, In the presence of both his Sons the Plaintiff and Defendant, declared his meaning to be, To devise to the Plaintiff his younger Son Kent of 4 l. per annum, for the term of his life out of his Lands, and the Defendant being the eldest Son (the intention of his Father being to charge the Land with the said Kent) offered to his Father and Brother, That if the Father would forbear to charge the Land with the said Kent to his Brother during the life of his Brother, according to the intention of his said Father; Whereupon the Father asked the Plaintiff if he would accept of the offer and promise of his brother: who answered, he would; whereupon the Father relying upon the promise of his said eldest Son, forbear to devise the said Kent, &c. so as the Land descended to the Eldest Son discharged of the Kent: and the opinion of the whole Court in this case was clear, that upon the whole matter the action did well lie.

Mich. 31 & 32 Eliz. In the Common Pleas.

CCLXXVI. Petty and Trivilians Case.

Livery of
seisin.

Humphrey Petty brought Second Deliberance against William Trevilian, and upon especial verdict the case was, That A was seised of certain Land, and Leased the same for years, and afterwards made a Deed of Forfeiture unto B, and a Letter of Attorney to the Lessee, C and D conjunctim vel divisione in omnia & singula terras et Tenementa intrare et seisinam inde, &c. secundum formam Chartarum, &c. Lessee for years by himself makes Liberties, and seisin in one part of the Land, and C in another part, and D by himself in another part; It was first agreed by the Justices, that by that Liberty by Lessee for years his Interest and Term is not determined, for whatsoever he doth, he doth it as an Officer, or Servant to the Lessor. Secondly, It was agreed, That these several Liberties were good and warranted by the Letter of

of Attorney, especially by reason of these words, In omnia & singula, &c.,
so as all of them, and every of them might enter and make Liberty in any
and every part. And so it was adjudged.

Mich. 31, & 32 Eliz. in the Common Pleas,

CCL XXVII. Rigden and Palmers Case.

Rigden brought a Replevin against Palmer, who avowed for damage less Replevin.
Rans in his freehold, the Plaintiff said, That long time before that Palmer had any thing, he him self was seised, until by A B and C disseised, Avowry.
against whom he brought an Assise and recovered, and the estate of the Plaintiff was mean between the Assise, and the recovery in it, The Defendant said, That long time before the Plaintiff had any thing, One Griffith was seised, and did enfeoff him, absque hoc, that the said A B and C vel eorum aliquis aliquid habuere in the Lands, at the time of the Recovery, Walmesley Justice was of opinion, That the War unto the Abovry, was not good, for that the Plaintiff hath not alledged, That A B and C were Tenants tempore recuperationis, and that ought to be shewed in every recovery, where it is pleaded. And then when the Defendant traverseth that which is not alledged it is not good: Windham contrary: For the Assise might be brought against others as wel as the Tenants, as against disseisors: But other real actions, ought to be brought against the Tenants only, and therefore it needs not to shew, that they were Tenants at the time of the Recovery; and also the traverse here is well enough: Another exception was taken, because the Abovry is, That the place in which containeth in 100 Acres of Land, the Plaintiff in bar of the Abovry saith, that the place in which, &c. contains 35 acres, &c. but that exception was not allowed, for it is but matter of form, & is helped by the Statute of 27 Eliz. Another exception was taken, as to the hundred of Cattel, and doth not shew in certain, if they were Ewes, or Lambs, or how many of each: which also was disallowed, for the Sheriff upon Retorno habendo may enquire what cattel they were in certain, and so by such meanes the Abovry shall be reduced to certainty.

Mich. 31. & 32. Eliz. in the Exchequer Chamber.

CCL XXVIII. Russel and Prats Case.

Russel brought an action upon the case against Prat, and declared, That certain goods of the Testator casually came to the Defendants hands: and upon matter in Law Judgement was given for the Plaintiff, sed quia deficitur quia dama, &c. Ideo, A writ of Enquiry of Damages issued, and now Prat brought a writ of Error in the Exchequer Chamber upon the Statute of 27 Eliz. cap. 8. But note, That the Judgement was given before the said Statute, but the Writ of Enquiry of damages was returned after the said Statute, & the said Statute doth not extend, but to Judgements given after the making of it. And it was moved, That the said Judgement is not to be examined here, but by the clear opinion of Anderson, Manwood, Windham, Walmesley, Gent, and Clark, Justices of the Common Pleas, and Barons of the Exchequer, the Writ of Error lyeth here, by the Statute, for in an action of Trespass (as this case is) full judgement is not given, until the Writ of damages be returned, and if before the Return of it any of the parties dieth, the Writ shall abate; and the first Judgement which is given before the Award of the Writ is not properly a Judgement, but rather a Rule, and order, and so in a Writ of accourt, where Judgement is given that the Defendant

Writ of Enquiry of Damages;

endant computet cum querentis, he shall not have Error upon that matter for it is not a full Judgement. See 21 E 3. 9. So as to the Judgement in a Writ of Trespass, sci. That no Writ of Error lyeth before the second Judgement after the Return of the Writ of Enquiry of Damages are given: And also it was holden by all the said Justices and Barons, That an Action, de his Testatoris shall habe an action upon the case de bonis testatoris, casually come to the hands and possession of another, and by him converted to his own use: in the life of the Testator, and that by the Equity of the Statute of 4 E 3. 7. de bonis aportatis in vita Testatoris.

Mich 31. & 32 Eliz. in the Common Pleas.

CCL XXVIII. Arrundel and the Bishop of Gloucesters, and Chaffins Case:

Quare Impedit. **S**ir John Arrundel brought a Quare Impedic against the Bishop of Gloucester, and Chaffin, and counted upon a disturbance to present 1 Novembri. Chaffin, as Incumbent pleaden, That 1 Maii next after the said 1 Novemb. he himself was presented to the Church by the Queen, the presentment to the said Church being devolved unto her by Laps. Upon which the Plaintiff did demur in Law: and the plea was holden insufficient, for the Plaintiff counted upon a Disturbance to him 1 Novemb. and the Defendant entitleth himself to an incumbency 1 May after, in which case the disturbance set forth in the Count is not answered by traverse, nor confessed, nor avoided: And of that opinion was the whole Court: For the disturbance of which the Plaintiff hath declared is confessed. And afterwards, It was moved by the Queens Servants, That the Queen might have a Writ to the Bishop, for the title of the Queen appeareth to be by Laps which is confessed, But the whole Court were cloar of opinion against it, For although it appeareth that he was lawfully presented to the said Church, and so once lawfull incumbent, yet it appeareth also, That the title of the Queen is once executed, and so gon, and nothing remains in the Queen, and now when the Defendant hath lost his incumbency by ill pleading (as he may) as well as by Resignation or Deprivation, yet the same shall not turn to the advantage of the Queen, for where the Queen presents for laps, and her Clark is instituted and inducted, the Queen hath no more to do, but the Incumbent must shif as well as he can for the holding of it, for by what manner so ever he loseth his incumbency the Queen shall not present again, otherwise it had been, if the Queen be Patron, and afterwards the Plaintiff had a Writ to the Bishop.

Writ to the
Bishop.

Mich. 31 & 32 Eliz. In the Exchequer Chamber.

CCL XIX. The Lord Pagets Case, in a Monstrans de Droit, The Case was,

Thomus Lord Paget, Father of William Page, was seised of the manor of Burton, and diverse other manors in three several Counties in his demesne as of fee, and so seised by Indenture, between the said Lord of the one part, and Trentham and others on the other part, and in consideration that the said Trentham and others, with the profits of the said manors shold pay his debts, and such summes of money which were contained in such a Schedule, and which he shold appoint by his last will, covenanted to stand seised of the said manors to the use of the said Trentham

of one Eustal, &c. for the term of four and twenty years, and after the Expiration or end of the said Term of twenty four years, unto the use of the said William Paget, his Son in tail, with diverse Remainders over; And afterwards the said Lord Paget was attainted of high Treason. It was here holden and agreed by all the Justices, and by the Council of both Sides, That the uses limitted to Trentham, and others are void, for here is not any consideration sufficient to raise an use, for the money which is appointed for the payment of his debts is to be raised of the profits of the Lands of the said Lord, which is not any consideration on the part of Trentham and others: But if the consideration had been, That they with the profits of their own Lands shold pay the debts, &c. It had been a good Consideration: It was agreed also, That the term for twenty four years to Eustal is void for want of sufficient consideration: And then it was moved, If this Lease being void, The use limitted to the said William Paget, son of the said Lord Paget shold begin presently upon the death of the Lord Paget or shold expect untill the twenty four years were encurred after the death of the Lord Paget, or not at all. And it was argued, That an use to be raised upon an impossibility shold never rise, as if I covenant to stand seised to the use of B and his heirs, after the end of the term for years, which I have in the Mannour of D, whereas in truth, I have not any term in it, the said use shall never rise: so here, No use to the Son can rise, for the lease for twenty four years shall never end, for it never can begin for want of sufficient consideration as is aforesaid; and if the said use in tail shold at all arise, it shold not rise before the expiration of the said twenty four years. As if I covenant to stand seised of certain Lands to your use when my Son and Heir shall come to the age of one and twenty years, now if my Son dyeth before such age, The use shall not begin before the time in which my Son (if he shall live) shold attain unto his said age. Egerton the Queens Solicitor, uses may be limitted to begin at times certain before which they shall not begin: and so in our case, the use in tail is limited to begin when the term of twenty four years, is ended, and therefore untill the Term be ended no use shall rise: and the use is limited to rise upon the end of the time or term of four and twenty years, and not upon the end of the estate; and so William Paget began his Monstrans de Droit, before his time. The Lord Paget had but an estate for life, and if so, Then the remainders are not contingent uses, but best presently; as if a man coenant, That after his death his Son, and heir shall have his Lands, now the Father hath but an estate for life, and the inheritance is vested in the son. Cook, I coenant, That after twenty four years ended, I and my heirs will stand seised to the use of my Son, &c. here the use in Fee doth rest in my son presently, so I coenant, That after my death, I and everyone who shall be seised, &c. shall be seised of the said Land to the use of my Brother, the said use shall rise to my Brother presently: I devise, That after the death of such a Sonck, I shall have the Land, nothing passeth to me till the death of the Sonck, but if Land be devised to a Sonck for life, and afterwards to another in Fee, the Devisee in Fee shall have the Land presently. Manwood, A devise or use limitted to one for life, the Remainder in tail, the first devisee doth disagree. Cook, the Remainder doth best presently. Manwood, I devise lands unto one until my son comes of full age. Cook, The remainder doth best presently. Manow. A use limitted to one to begin at Mich. next, the remainder over, if in the mean time the Lessee obtain the good will of I S, which he cannot obtain, the same remainder is not good. And if one coenant to stand seised to the use of Salisbury plain, for the life of I S, and after the remainder to A, it is a plain case, That he in the remainder shall take presently, 37 H. 6. 3 d. Cestuy que uswilled, That his Feoffees should make an estate to A for life, the remainder to C in fee, and A would not take the estate, C shall have

have a Subpoena against the Feoffees after the death of A. See there the case; And if Land be devised, be devised to one for life, the Remainder over to another in fee, and the Devisee for life doth refuse; Quere, if the Devisee in Remainder shall enter presently, See Fiz. Subpœna; And also he put the Case, where Land is devised to a Sonch for life, the Remainder over to another in fee, he in the Remainder shall enter presently, see the same Case in Perkins vob. for the Sonch never took any thing by the devise, notwithstanding that there is not any particular estate upon which a Remainder can depend, yet the intent of the Devisee shall be observed in as much as it may, and the particular estate limited to the Sonch is merely void, of which a very stranger shall take advantage, &c. And it was resembled to a Case in Brimmons Case, where an use in Remainder limited upon good consideration shall be good in Law, although the particular use be not grounded upon good consideration, and so faileth: And he urges a Case alledged by Popham in the Case of the Earl of Bedford, that if in Cranmers Case, the estate for yeares limited to the Executors, had been limited to Administratores, it had been merely void, and the use in tail limited in tail should begin presently, and that was by reason of the interball betwixt the death of Cranmer, and the taking of the Letters of Administration, in which mean time there is not any person capable, and therefore the Remainder shall best presently, which is a fit case to prove the Case at Bar: And he remembred that in the Argument of Cranmers Case, Lovelace Serjeant, would have an Occupancy in the Case of such a Term limited to Administratores, quod omnes iusticiaria negaverunt, and in the said Case of Cranmer, it was holden that the Lease by yeares being void, the estate in the Remainder did begin presently, without regarding the extinction of the yeares, &c. And truly, a Term imposeth in it selfe an Interest, but if the limitation had been after the Term of twenty fourteene yeares, &c. the same implyeth but a bare time: And to that purpose he cited the Case 35. H. 8. Br. Exposition, 44. A Leasehold to B for ten years, and it is covenanted betwixt them, that if B pay unto A within the said ten yeares one hundred pounds, that then he shall be seised to the use of B in fee, B surrenders his Term to A, and within the said ten yeares payes the one hundred pounds to A, here B shall have Fees, for the yeares are certain; contrary, if the Covenant had been, If he pay within the Term.

Popham Attorney General Contary, The use shall not go beyond the Contract, and here the Term doth not best, in that it was Limited for want of sufficient consideration, of the Lord Paget, and the intent was not that his son should have possession of the Land before the term of 24. yeares expired.

use what it is. A use is a thing in Conscience, according to confidence to be guided by the intent of the parties: and upon such Case at the Common Law W. Paget should not have a Subpœna before the yeares expired, and this word (Term) doth not alter the Case; and there is a great difference betwixt an use raised by Feofiment and an use raised by Covenant, For in the first case the Feofor doth dispossess himselfe utterly, and if it takes not effect to one purpose it shall take effect to another purpose: But in the Case of a Covenant: it is otherwise, for the use riseth according to the contract and not otherwise, and here the Contract is, That W. Paget shall have the Land not immediately after the death of his Father, but after the 24. yeares expired.

Owen Serjeant, It hath bin agreed of both sides, That every use shall go according to the intent of the parties, and here it appeareth, That it was the intent of the Lord Paget, to put all the use out of himself, and I see not any difference betwixt an use raised by Covenant and a use raised by Feofiment for a use limited utrovis modo to Paules People for the life of A. and after to the use of B in fee, the first use is void, but the second good, and here the meaning of the Lord Paget plainlie appears, for there is a Proviso in the Indenture, That after the said debts and legacies paid the use limited for

24 years shall cease; and it is expressly averred, that they are paid 11. H. 4. A leasehold for life, the remainder in tail to himself, the Remainder over to a Bastard in Fee, the moane Remainder limited by A. to himselfe is void, and the remainder over shall be immediate to the estate for life. Egerton, the words of the Indenture, and the intent of the parties are the rules of uses. The first use is void, For the intent of the Lord Paget was void, because contrary to the Law, and usual, to whom the use for years was limited, could not take presentlie, for his estate is limited to begin after the death of the Lord Paget, and there is a great difference betwixt uses raised by Covenant, and by Feoffment, For when a use is raised by Feoffment, there all is out of the Feoffor, the land is gone, the use is gone, the trust is gone, nothing remayning but a bare authority to raise uses out of the possession, of the Feoffees, and being new uses, there, although some of them be void, yet the other shall stand, but where a use is raised by way of Covenant there the covenantor continues in possession, there the uses limited, if they be according to Law, shall raise and drawe the possession out of him, but if not, the power still shall remaine in him, untill a lawfull use shall arise, which vnuale the same shall not rise for any defect in the precedent use? And here is no Term, therefore no end, for that which hath not a beginning hath no ending, And if there be no estate, then no Term, and if there be so, then it is to be taken for the time of 24 years, which is not as yet expired, and then was there in the Lord Pawles an estate descendable for 24 years, which by the Attainder both accrued unto the Queen. And he cited the Case of 13. Eliz Dyer. 306. Feoffment to the use of himself for life, and afterwards to the use of a woman which he intendeth to marrie, untill the issue whiche he shold begot on the said woman shold come unto the age of 21. years, and then to the use of the woman during her widowhood; They are married, the husband dyeth without issue, the wife shal hold the land: But by him, if this use had bin raised by way of Covenant it shold be otherwise. Coke, Admit that all the uses be good, yet his meaning was, That the debts and legacies being paid W. Paget should have his land, for it is provided by the Indenture, That when the debts & legacies are paid, the estate for 24 years shall cease. Manwood, the payment of the debts cannot end that which never was, and as to the two first estates, they were never out of him, therefore they came unto the Q. by his attainer. Coke, After debts and legacies paid all other estates but the estate of W. Paget cease, therefore William Paget shall have the Land. And the rule of Shelley 35. H. 8. 35. is worthy to be received, scil. That learning is honest, and wished to be used, that every man learned in the Law, doe construe Deeds according to the meanings of the makers. Manwood, A Feoffment to the use of Salisbury Plainne for the life of 15, the Remainder over, the same use shall come into possession presently, for there is not any person capable of the particular estate, but where the first use is limited to a Bastard, the remainder over, there, the Remainder shall not come into possession presently, for the Bastard is a person capable, but not by such forme of conveyance in consideration of naturall affection; Popham, In the case of Bastard, there was an estate for life executed to the Father in possession, and then a Remainder to a Bastard, the Remainder to the Sons lawfully begotten, but here in our Case no estate is created to precede the estate of William Paget, upon which the Remainder can depend.

At another day, It was argued by Coke, It is to be agreed on both sides, That the estate for four and twenty years is merely void, and also the first use limited to Trentham and others, and it is not reason, that the use limited to William Paget, should expe until the four and twenty years be expted by effluxion of time, and to that purpose he cited Cranmers case, where an estate in use was limited to Cranmer for life, the Remainder to his Executors for one and twenty years, the Remainder over in tail to his Sonnes

and heir, &c. Cranmer is attainted of Treason and Heresie, so as he could not make a Will, or Executors, there it is holden, That the term is void, because no Executors, and that the Remainder in use shold be stt presentl, and shold not expec untill the said number of years expice by effluxion of time. A difference hath been put betwixt the case of Cranmer, and the case at Bar, because in Cranmers Case there was a possibility at the beginning that the Term for years might be good, for the term became void by matter ex post facto, sci. By the attainte of him, which disabled him to make Executors, but in the case at Bar, the term for twenty four years was expesly void ab initio: But that difference is without reason, for what reason is there, That the Remainder shold be farther off the possession when the estate for years is originally void, then when it becomes void by matter ex post facto? Suppose that the Lord Paget had by Indenture covenanted as above for the two first uses, (being in truth void in Law) and afterwards by another Indenture, reciting, That whereas he had covenanted, That in consideration That A. with the profits of his Lands shold pay his debts, &c. to stand seised of the said Lands for his own life: Now he covenants, to stand seised to the use of William Paget, and his Heires, shold not he presently be seised to the use of VViliam Paget and his Heires, although the words be, That then and from thenceforth? For I hold it a clear case, that his estate begin presently, being limittted to begin upon a void estate, althoough the limitation be by words de futuro. And to this purpose he cited the case 3 E 6 Br. Lease 62. A man leaseth for years, Habendum post dimissionem inde fact to J S, finitam, where no such demise is made, the same Lease shall begin presently: If an Indenture be made to a Monck, and another, Habend. to the Monck for one and twenty years, and after the end of that, to the other for one and twenty years, the other shall have it presently. And he put a Case 7 E 3. in the new Impression, 19. and in the old Impression 317. Where one Maud brought a Formedon in the Remainder, and comfes that one Hamond was seised, and gave the said Tenements to one Robert &c. in tail, and that for want of such issue, that the tenements shold return to the said Hamond for life, the Remainder to the Demandant in Fee, and counted further, That Robert is dead without issue, and that Hamond is also dead, &c. It was holden, althoough that the Remainder reserved to the Donor, be void, yet the Remainder over in Fee is good, &c. And in that case, althoough that the Remainder in Fee was future, sci. After the death of Hamond, and the estate reserved to Hamond merely void, and that originally, and not by matter ex post facto, yet the Remainder in Fee was good, and shold begin presently upon the death of Robert without issue, and shold not expec the death of Hamond. Pr. Attorney hath given a Rule, That the intent of the parties is the Direction of uses, as also of Wills, and therefore I will put one Case of Wills, 37 H 6. 17. If a man devise Lands to a Monck for four and twenty years, and after the same ended to another in Fee, here the Monck being a dead person cannot take the estate limittted to him, and therfore it is void: but the Fee limittted to the other is good, and shall take effect presently: If it be so in a Will, why not so also in uses? For th: intents of the parties do direct the constructions of both: And our case here is a stronger case, then the case cited 37 H 6. 36. for there where Land is devised to a Monck for life, there may be colour of an Occupant during the life of the Monck, who might take it, although the Monck himself cannot take it, and so the Remainder doth not take effect presently as to the possession, but shall stay till after the death of the Monck: But here is not any colour of an Occupant, for the estate here is a Lease for years, which cannot admit an Occupant. And see also 37 H. 6. 36. If a man devise that his Feoffees shall make an estate to IS for life, the Remainder over to C in Fee, and I S will not take his estate, C shall have

have a Sub-poena against the Feoffees to make an estate to him, leaving out 15 and see Amy Townsends Case in the Commentaries, where the Husband seised in the Right of his Wife, makes a Feoffment in Fee to the use of himself, and his wife for their lives, the Remainder over to another; the husband byeth, the wife refuseth the estate limited to her by the husband; she brings Sur cui in vita, not against the heir, but against him in the Remainder, to whom the Land doth accrue by the refusal of the wife; not against the heir of the Feoffor, and I grant, That where an estate in use, or otherwise is to begin upon a condition precedent which is impossible, or against the Law, the estate shall never rise or begin. And hers the Case of The Lord Borooughs, 35 H. 8. D. 55. was cited, Where the Father covetailed in consideration of marriage of his Son, that immediately after his death his eldest Son shall have the possession or use of all his Lands according to the same course of inheritance, as then they stood, and that all persons now seised, or to be seised, should be seised to the said use and intent, and it was holden, That upon that matter no use is changed: But if the Lords had been Immediately after his death, they should remain then, although the words of the Limitation be In futuro, the use of the Fee shall rest in the Son presently, and the words in futuro ought not to be interpreted, but in benefit of him to whom the use, and estate is limited. 9 Eliz. Dyer 261. A Leasehold for thirty years, and four years after the beginning of the said term he makes another Lease for years by these words, Noverint, &c. dictis 30. annis finitis & completis, demissile omnia premissa, to the said, &c. Habendum & tenendum a die confectionis presentium, termino predicti, finite, usque ad finem 30. annorum. And by the opinion of all the Justices, This new Lease shall commence in possession at the end of the former term, and not before, and if it should not be so expounded, the second Lease should be in effect an estate, but for ten years, which was not the intent of the parties, and every grant shall be expounded most strongly for the grantee, and to his advantage, to which purpose he laid he had vouch'd this Case. Also by him there is not any difference, where the use is limited by way of covenant, or upon a Feoffment: and if a man enfeoffeth B. upon condition that he shall enfeoff C, now if he offer to enfeoff C, and he refuseth, the Feoffor may re-enter, But if the condition were to give to C in tail, then upon such refusal of C the Feoffor shall not re-enter. See 2 E 4. 2. 19 H 6. 34. Et si Equitas sic adhibenda in constructione of conditions a multo fortiori, in case of Uses: a Feoffment in Fee upon condition, that the Feoffee shall grant a Rent charge to J S who doth it, but J S refuseth, the Feoffor shall not re-enter, for that was not the intent of the condition: If in the principal case, the limitation of the use had been after the expiration of twenty four years, then no use should rise before the twenty four years expire, but whence, not the time, but the estate is material, there, if the estate be void, the use shall go to him in the Remainder presently, and shall not stay the time, &c.

Egerton Solicitor, first it is to see, if the use limited to William Paget be good, secondly, if William Paget doth not come before his time to shew his Right: If this use limited to William Paget be a Remainder or an estate to begin upon a contingent, or a present estate, the estates formerly limited being void, and he conceived, that it is not a Remainder, for there is not any estate upon which it may depend; And the words are after the estate for twenty four years ended or expired, that then and from thenceforth to the use of William Paget. &c. so that no use is limited to him before the particular estate is ended, therefore no Remainder, for a Remainder ought to begin when the particular estate begins. Without doubt that was not the intent that William Paget should have the Land during the life of his Father, and yet the use limited during the life of his Father, was void, and if the Remainder should take effect during the said twenty four years against Euſall

and his companions, wherefore should it not also take effect against Trentham and the others, to whose use it was limited during the life of the Lord Paget: And here, the use limited to William Paget is to begin upon a collateral contingent, upon which if it cannot rise, it shall not rise at all, and I conceive that the use limited to William Paget, shall never rise, or begin, for it is limited to begin when the term of twenty four years is ended, and that is never, for that which cannot begin, cannot end, and this Term is merely void, Ergo, it cannot begin, Ergo, it cannot end, then this therefore cannot be, and so this contingent can never fall, H. 6. & 7. E. 6. A Lease was made for yeares upon condition, that if the Lessee doe not pay such a summe of money, that he should lose his Indenture, the meaning and sense of these words is not that he should lose the Indenture in parchment, but that he shoule loose his Term: The Judgement in an Ejctione firmaz, is, Quod querens recuperit terminum suum, that is to be understood, not the time, but his Interest in the Land for the Term (and Coke secretly said, that in that Case there is not any contingent, for the estates precedent never began) And as to the Case cited before by Coke, Br. Leases 62. If the last Lease be made by Indenture, reciting the former Lease, certainly the second Lessee shal ont be concluded to claime the Land demised presently, but shall carry untill the vertes of the first Term be expired by effluxion of time. And as to Mawnds Case cited before, there is an estate upon which a Remainder may depend, scil. the estate tail alledged to Robert, &c. As such as now is limited to William Paget had been limited at the Common Law to a younger Son, the eldest Brother shold have the Land in the Interim discharged of any use, and now after the Statute, no use limited to William Paget, before the contingent; Where, therfore, is it in the meane time? In the Lord Paget, who being attainted, it accrues to the Queen; and out of the possession of the Queen, this use shall never rise, although that the contingent be performed, for now the use is locked up; A use doth consist in privy of the estate and confidence of the person, if these be severed, the use is gone: And here, if the possession be in the Queen, shee cannot be lesed to another use. Note by Godfrey, that the opinion in Baintons Case, 8. Eliz. Dyer 3. 7. is not Law, and so hath the Law been taken of late; Popham contrary; If before the Statute of 27 H. 8. the Father covenant in consideration of Advancement of his Son to stand sealed to the use of IS for life, and after the death of IS, to the use of my Son in Fee, here the estate of IS in the use is void, and yet the iestate in the use limited to my Son, shall not take effect before the death of IS; for the estate of my Son is not limited to take effect till after the death of IS, and therfore the possession of the Father is not charged with the use during the life of IS; But if by way of Feoffment IS had refused, the Son shold have it presently, and the Father shold not have it, for he by his Libery hath put all out of him, and it was not the intent of the Feoffment, that the Feoffee shold have the Land to his owne use; Popham allowed the difference mentioned before out of 2 E. 4. & 19. H. 6. betwixt a Feoffment upon condition to enfeoff a Stranger, and to give in tail to a stranger, and that is grounded upon the intent of the parties. And Owen Herseant put the Case cited before 13 Eliz. Dyer 330. A Feoffment is made by the Husband to the use of himselfe for life, & afterwards to the use of one Anne, whom he intended to marry, for, during, and untill the Son which he shold beget on the body of the said woman had accomplished the age of thirty one years, and after such time that such Son shold come unto such age unto the use of the said woman, quacdui, shee shold live sole, they entermarry, the Husband dyeth without issue, the wife entreth immediately, and continues sole, and her Entry was adjudged lawfull, and the estate in Remainder good, although shee never had any Son, and thereupon a Writ of Error was brought, and the first Judgement was affirmed (and note by Tanfeild, and others at the Bar, that that was the most apt

{The Queen against the Arch-Bishop
of Canterbury, &c.

apt case to the purpose in the Law) & the reason of such Judgment was, because they took it, that Deeds ought to be expounded according to the meaning of the parties, and estates in possession : I grant there ought to be a particular estate, upon which a Remainder may depend, but the same is not necessary where the Conveyance is by way of use : And if I covenant that A shall have my Lands to him and his Heirs, to pay my Debts and Legacies, the same is by way of bargaine and sale, and nothing passeth without Enrolment. And here the Attainder doth not prevent the use, as it hath been objected by Master Solicitor, for the use doth rise before the Attainder, for William Paier had a Remainder in tail, in the life of his Father, upon the first limitation, &c. Periam Justice, I lease my Lands to you, to begin after the expiration of a Lease which I have made thereto to I S, and in truth he hath not any Lease, the same Lease shall never begin. Manwood cheife Baron, I lease my Lands to you, or grant a Rent to you to begin after the death of Prisoie Serjeant at Law, when shall that begin ? Coke, Presently : Manwood, cuius concordium est Lex.

Mich 31. & 32 Eliz. In the Common Pleas. Rot. 1832.

CCLXXX. The Queen against the Arch-Bishop of Canterbury, Fane,
and Hudson.

The Queen brought a Quarempedic against the Arch-Bishop of Canterbury, the Bishop of Chichester and Hudson, and counted that John Ashburnham was lessed of the abbouzon of Burwash, and was outlawed in an action of Debt, during which Outlawry in force, the Church holden, for which it belongs to the Queen to present ; the Arch-Bishop and Bishops plead, that they claime nothing but as Metropolitan and Ordinary : Fane pleaded that King E. 4. Ex gratia sua speciali, &c. and in consideration of faithfull service, &c. did grant to the Lord Hastings the Castle and Barony of Hastings, and Hundre, &c. Et quod ipse haberet omnia bona & catalla tenementum, residuum & non residuum, & aliorum residuum quoramcumque hominum, de & in Castro, Baronia, &c. or within the same, pro munere debi, &c. tam ad sectam Regis, &c. quam, &c. Ut legatorem, & quid ipsae fecerit, per se vel per, his sufficient Deputies, &c. And from him derived to the now Earle of Huntington as Heire; and the said Earle so seised, and the said Ashburnham lessed of the abbouzon as appendant to the Honour of Ashburnham, holden of the said Barony : The Church aforesaid during the Outlawry aforesaid, became void, for which the said Fane, ad dictam Ecclesiam usurpando presentavit, the said Hudson, who was admitted and instituted, &c. with this, That idem T. C. verificare vult, that the said Church of Burwash is, and at the time of the grant was, within the Precinct, Liberty, and Franchise aforesaid, and that the said Honour of Ashburnham, at the time of the grant aforesaid was holden of the said Barony : and the Incumbent pleaded the same Plea : and it by that grant of King Edward the fourth, to the Lord Hastings, scil. omnia bona & catalla, &c. The presentment to the Church should passe or not, was the question. Shuttleworth Serjeant, argued for the Queen, he confessed that the King might grant such presentment, but it ought to be by speciall and sufficient words, so as it may appeare by them, that the intent of the King was to grant such a thing, for the generall words (omnia bona & catalla) will not passe such speciall Chattell in the Kings grant :

And he conceiveth that by the subsequent words, no Goods or Chattells shall passe by such Grants, but such which may be seised, which the avoidance of a Church cannot be, & quod ipse licet, per se vel ministros suos ponere se in seisinam, 8 H. 4. 114. 15. the King granted to the Bishop of London, that he shoulde haue Catalla felonum & fugitivorum de omnibus hominibus & tenentibus de & in terris & feodis predictis. and of all resiants within the Lands and Fees aforesaid, Ita quod, si predicti homines, tenentes & residentes de & in terris & feodis predictis. seu aliqui eorum, seu aliquis alius infra eadem terra & feodis pro aliqua transgressione, &c. vi. librum, &c. and by Tirwic, By that Grant the goods of thole who are put to Penance shall not passe, so of the goods of one Felo de se, vi. 42 E. 3. 5. One being impannelled on the Grand Enquest before the Justices of Oyer and Terminer, pleaded the charter of the King of exemption from Enquests, and because in the said charter was not this clause, licet tangat nos & heredes nostros, upon challenge, it was rejected, and the party charged and sworne: and if the King grant to me to appropriate an abbouison, which in truth is holden of the King, such a grant is void, if there be not speciaall words by which it might appearre that the King had notice of it, and that his intent was that the grant should extend unto it, 16 E. 3. Grants 58. & 33 E. 3. Grants 103. So here the Presentment is a speciall chattell, and is not usually intended or thought upon, when men speake generally of goods and chattells: But admit that it be, yet the Plea doth not lye in the Defendants to plead, for they do not derive any Interest under this grant, but are meere strangers to it, and therfore they shall not take any advantage, by laying this grant in the Queens way, for the Queen hath good title against all persons but those who claime under the grant, but that is nothing to the Defendants, for one cannot crosse the title of the King, if he doe not make a title to himselfe, As 39 E. 3. 18. 37 E. 3. 11. If the title of the King be sound by a false Office, the party greiveth cannot travele the Kings title without making title to himselfe sound by Office, and then the King may choose whether he will maintaine his own title sound by Office, or travele the title of the other. Walmesley, contrary: This Title of Presentment is a Chattell, Rex habebit omnia catalla felonum, &c. A Term of yeares is a Chattell, so the Issues and Profits of the Lands of men outlawed for Felony, so a right of Action for Goods; Therfore a Title to present; and if such a Title accrue to the King, by such generall words they shall passe from the King, and as to that which hath been objected, That the Grant of King Edward the fourth doth not extend only to such Goods and Chattells which may be seised, he cited the Case of 39 H. 6. 35. b. Where the Grantee of a Rent for Term of yeares granted, omnia bona & catalla sua, tam viva quam mortua, the Rent doth passe, and yet the Granteor cannot put him in seisin of it but ought to expect the day of payment of it. And this Title to present is not a thing in action, for if no disturbance be made, the party may haue the benefit of it without any action. Anderson conceived, That this Title to present cannot passe by those generall words (bona & catalla) for they doe not extend to Rights, or things in Action, for such things only which are commonly known and understood, shall passe by such words: By grant of Goods, Chattells realls will not passe, for when men speake of Goods, Household stuff, mony, and such personall things only are understood, So a man cannot be said to have a Chattell but where he is possessed of it, and here this Interest is but jus præsentandi.

Periam, This Interest is a Chattell, for if the Church become void, and before presentment the Patron dyeth, the Executors shall have the presentment, for it was a Chattell vested in the Testator: It was adjoined:

Hill. 31 Eliz. Rot. 1527. In the Common Pleas.

CCL XXXI. Jones Case.

Hen. Jones had stolen the Plate of Trinity Colledge in Oxford, and by mediation of his freinds it was concluded, and agreed that no Evidence should be given against him at the Sute of the Colledge, and that the Colledge should be recompenced for the losse, and two of his Freinds, Brien and Brice were bounden unto Doctor Unherhill, Rector of Lincoln Colledge in Oxford, (but unto the use of the Master and Schollars of Trinity Colledge) upon condition that if the said Obligoz paid forty pounds within six moneths after, the said Hen. Jones should be acquitted & released of the troubles wherein he now is, with the safety of his life, that then, &c. In debt upon Obligation The Defendants pleaded that he was indicted at the Assises at Ox. & arraigned upon it, scil. for the Stealing of the said Plate, & found guilty thereof, and had his Clergy, and was burned in the hand, and he demanded Judgement of this Action, upon which there was a Demurrer: Wind. If the words had been so pay the money, after that Henry Jones should be released and acquitted of the troubles in which he now is without any more, the Defendants had been bounden to pay the mony. Periam, If the words of the condition had been, that after Henry Jones should be acquitted of the Felony, then no mony payable, but here the words are with safety of his life: but here he conceived, that the intent of the Obligation was, that no Evidence should be given, and so to save his life from the Gallows, for which the Defendants might have shewed the speciall matter, and aberved that the Obligation was made for the discharge of a Felon, and so against the Law &c. but now they cannot take advantage of it, and afterwards Judgment was given for the Plaintiff.

Pasc. 31. Eliz. In the common Pleas.

CCL XXXII. Castle and Oldmans Case.

Castle brought Debt against Oldman for a pain assested in a Court Baron, and declared That the Defendant was presented at the Court Baron for such an offence, and if he did not amend it before the next Court, he shoulde pay such a pain: And at the next Court it was presented, That the Defendant had not amended it, and so he had incurred the pain upon which the Action is brought, and now the Defendant wold wage his Law, and it was much doubted whether wager of Law lay in the Case. Shudeworth, 13. H. 7. 31. Upon a Recotery in a Court Baron, wager of Law lyes not, by Conisby, which Periam denied; And by him upon an account by another hand, it doth not ly, for it is a matter of which the Country may have Conusance, so here the matter is notorious, which lyeth in the knowledge of all the Iurores who presented it: And by him, the pain ought to be asserted, which Anderson denied. For there is a difference betwixt an amercement and a paine, which Windham granted. And see for the amerceament in the Leet, 10 H. 6. 7. 12 R. 2 Ley. 43. But in a Court Baron, because it is not a Court of Record; so in Debt upon an Arbitrament, the Law lyeth. And Waler one of the Decondaries shewed

unto the Court a President, & Eliz. Wheresoever debt was brought by Sir Thomas Tyndall, upon a pain forfeited for the breaking of a By-law in a Court Baron against Tyler; and the party was received to W齋e his Law.

Pasch. 31. Eliz. In the Common Pleas.

C C L X X X I I . Thetford and Thetfords Case.

Partition.

In ~~the~~ ~~last~~ the Plaintiff declared, upon the demise of the moiety of the Man-
nor, whereof part of the Tenants were Copy-holders, and part Free-
holders, and that A was seised of the Man-
nor, and had issue two Daughters,
and dyed seised, the Daughter entred, and made partition of the Demeans
only, but the Services of the Free-holders and Copy-holders did remaine in
Common; One of the Daughters took Husband, the Husband and the Wife
make a Lease of the moiety of the Man-
nor to the Plaintiff for yeares by
word, rendering Rent, the Lessee entred into the Demeans allotted to the
~~wife~~ ~~of~~ ~~the~~ ~~Lessee~~. The Husband dyed, and the Wife brought an Action of
Wast. Anderson, By the partition the Demeans are now become in gross,
and severed from the Man-
nor; And if partition be made of a Man-
nor, soas the Demeans be allotted to one Sister, and the Services to the other, now
the Man-
nor is dissolved, yet if the other Sister dyeth without issue, and her
part descendeth to the other, now it is become a Man-
nor againe, which Wind-
ham and Periam granted, See 12. H. 4. 271. And Anderson was of opinion,
that the moiety of the Demeans did not passe by the words of the moiety of
the Man-
nor, as if one seised of a Man-
nor maketh a Feoffment in Fee of
part of the Demeans, and afterwards re-purchaseth them, and then makes a
Feoffment of the whole Man-
nor, and Demeans re-purchased, will not passe
thereby, for they were once severed from the Man-
nor, and not re-united by
the purchase. Periam, Although that in truth it is not a Man-
nor nor any part
of a Man-
nor, yet if it hath been reputed, the moiety of the Man-
nor, it shall
passe by such name, which Anderson granted, but it is not like to car Case.
Periam, This is an ancient partition, as appeareth by the Verdit, ten yeares
past, and also it hath been reputed the moiety of the Man-
nor, therefore it
shall passe, Windham concessit, Periam, The intent of the Grantor is the best
Interpretor of these words, without relying strictly upon the words. Anderson,
If we shall take the intents of men for Law, we shall fal into many con-
fusions in our proceedings, but the Law is to judge of the meanings of men
by their words, ever in the constructions of Wills, the intent of the Testa-
tors have not had further favour then the words have given leave. As to the
other point: It was argued by Walmsley, that the Lease made by the Hus-
band and Wife without Deed was void, See 1. Ma. Dyer 91. And if the
Wife after the death of her Husband accepts the Rent upon such a
Lease reserved, it shall not bind her, for the consent of the Wife ought to be
at the beginning of it, which cannot be without Deed: Anderson conceived
that the sense is not merely void, See 15. Eliz. Smith & Stapletons Case, Plowd.
431. Periam, The matter is clear, for although the Plaintiff declares general-
ly of a Lease made by the Husband and Wife, yet the Jury hath found, that
it was by Indenture, and that is pursuant enough. And if the Husband
and wife make a Feoffment of the wifes Land, it is the Feoffment of both of
them, which Walmsley granted: It was adjourned.

Trinit. 31. Eliz. in the Common Pleas.

C C L X X X I V . Smallwood and others, against the Bishop of Lichfield and others, Quare Impedit.

Humphrey Smalwood, Richard Say, and Thomas Say, Executors of William Say, brought a Quare Impedit against the Bishop of Coventry and Lichfield, and M Incumbent, quod permittat praesentare ad Archidiaconatum de Derby, which was void. Et ad presentationem Testatoris in vita sua, & nunc in retardationem executionis Testamenti, did belong to the Executors: Exception was taken because these words (In retardationem executionis Testamenti) could not be applied to a disturbance in the life of the Testator. Windham, There is not any writ in the Register of Quare Impedit, upon a disturbance made to the Testator. Anderson, What then? therefore no remedy because no writ according to his speciall matter, 25 E. 3. 25. Goods are taken out of the possession of the Testator, upon which the Executors brought Trespass. In retardationem executionis Testamenti, the writ abated, for it ought to be where the Executors themselves were possessed: Periam, The Abbotsone it selfe is valuable, not the presentment, therefore it cannot be said in retardationem; Periam, Before the Statute of 4 E. 3. 73. In Case white damages were only to be recovered, the Action, in mortuus cum persona, but where the thing it selfe was to be recovered, there the Action accrued to the Executors: Anderson, 7 H. 4. 73. Ejectione firmæ, of an Estate made unto the Testator was maintained by the Executors by equity of the Statute of 4 E. 3. cap. 6. And by the opinion of the whole Court, the Executors might have a Quare Impedit upon a disturbance made to the Presentment: It was objected also, that a Quare Impedit doth not lie of an Archdeaconry ship, for it is not locall, nor any Indenture made of it, but is only a matter of function, but it was not allowed, for an Archdeacon hath Locum in choro: And by the Statute a Quare Impedit lyeth of a Chappell, and by the equity of it, of a Prebend, &c. See the Statute of West. 2. Quare Impedit of a Chappell, Prebend, &c. It was moved, if the Executors had presented after the death of the Testator, whether the Archdeacon ought to receive the Clark of the Testator, or of the Executors, and the opinion of the Court was, That the Bishop should have election therein: And afterwards Judgement was given, that the writ should abate, for the disturbance to the Testator cannot be supposed new matter (In retardationem executionis Testamenti) But yet it was agreed, that the Executors might have their speciall writ upon their Case for the said disturbance.

Trin. 31 Eliz. In the common Pleas.

In an Action brought against one as Executors, who pleaded that he refused, Upon which the parties were at Issue: The Bishop did certifie, quod non recusavit, where as in truth he had refused before the Commissary: Fenner Sergeant moved, to have the advise of the Court upon that matter, and argued that the Court ought to write to the Commissary: Which was denied by the whole Court, for he is not the Officer unto the Court to that purpose, but the Bishop himselfe is the Officer: And the party cannot aver against the certificate of the Bishop, no more then against the Returne of the Sheriff: And the Court was also of opinion, that the only remedy for the Defendant was by Action upon the Case against the Bishop for his false Certificate: But it was moved, That the Issue joyned upon the resuall ought to be try-

ed by Jury, and not by the Certificate of the Bishop; and so was the opinion of Windham and Walmesley. Periam, Where the Issue is whether the Execution did refuse before such a day, or after, there the tryall shall be by Jury, contrary where the Issue is upon refusal generally because the refusal is before him as a Judge, as also is Resignation.

Mich. 31. Eliz. in the Common Pleas.

C C L X X X V I I . Sutton, and Holloway and Dickons
Case.

Estoppell. **I**n an Ejctione sive by Richard Sutton against Robert Holloway, and Thomas Dickons, upon not guilty pleaded, the Jury found this speciall matter, scil. That the said Thomas Dickins had not any thing in the Lands in question at the time of the making of the Lease, upon which the Action is brought, scil. Who leased by Indenture to the Plaintiff for certain years, who entred, and afterwards the said Thomas Dickins, contra Indenturam suam prædictam intravit upon the Plaintiff, and, If the same should be a good Lease by Estoppell was the question; the Jury having found the truth of the matter, scil. That the Lessor had not any thing at the time of the demise, Walmesley objected, That the Jury ought not to find the Indenture, because it was not pleaded, for the Plaintiff doth not declare upon any Indenture, but the Exception was not allowed, but in old time the Law was such, 22 E. 3, but at this day the Law is otherwise, See Scholastira's Case, 14. Eliz. Plowd. 411. But where a Release or other writing ought to be pleaded, there it ought to be shewed to the Court. Walmesley In rei veritate, the Lease is void, for a man cannot let Land in which he hath not any thing: but in respect of the parties themselves, the Lessors and Lessee both are concluded to say, That is no Lease, for none of them can say the contrary: But here the Jury which is a third person, is not estopped to say the truth, but they may find the speciall matter and the truth of the Case, and the Estoppell hath not place there, but the truth of the matter appearing to the Judges, the Judges ought to adjudge upon the same, scil. If a man may make an effectual lease of Lands, in which he hath not any thing. At another day it was moved by Shuel. Although that the Jury be not estopped, yet the parties themselves are estopped, for the Law makes the Estoppell betwixt the parties, and the Law will not permit a man to say any thing against his own Deed being indented, nor any matter contained in it, Periam and Anderson clearly for the Plaintiff, That it is a Lease by Estoppell and by Periam. It hath been adjudged in the Kings Bench, That the Jury in such case are compellable upon paine of Attaint to finde the Estoppell: Walmesley, Here the Estoppell is cut of Doors, for the truth of the matter disclosed by the Verdict, not by the parties only maketh the Estoppell, and he much relied upon the case of Littleton, 149. 2. A woman, seised of Lands in Fee, taketh a Husband, who alieneth to another in Fee, the Alienee leaseth to the Husband and Wife for their lives, now the Wife is remitted, and seised in Fee as before, here if the Alienee, i.e. the Lessor, bringes an Action of Waste against the Husband and Wife, the Husband cannot bar the Plaintiff by the truth of the matter, scil. the Remitter of his wife, for he is estopped to say against his own feoffment, and his re-taking of the particular estate to himselfe and his wife: But if in an Action of Waste, the Husband make default at the Grand Jury, and the Wife prayeth to be received, shee may well shew the whole matter: So here the Jury: Windham, The Plaintiff ought to have demurred upon the Evidence: Periam, What if the Defendant will not joyn with the Plaintiff in the Demurrer: Windham, there the Court ought to over-rule them, and if

the parties had demurred upon the Evidence, we should have adjudged upon that Evidence, that a man cannot lease lands in which he hath not any thing: And here, the Stoppell could not be pleaded, for the Defendant hath pleaded the generall Issue, but if he had pleaded Non demisit, then the Stoppell should have holden place.

Pascb. 31. Eliz. in the Common Pleas.

CCLXXXVII. Milles and Snowballs Case.

A Juroz did surmise at the Bar, that he was a Tenant in Ancient de mesne, and had his Charter in his hand, and prayed to be exempted from the Jury and discharged, but the Court did not regard it, but caused him to be sworn. And Windham said, that he might have his remedy against the Sheriff, and Nelson Pzeignothoyz said, if he had made default and lost Issues, he might shew his Charter in the Exchequer upon the Amercement estreat, and ther: he should be discharged: In that Case, it was holden by the Court, That if a Feoffment be made of a House, and the Deed be delivered in the House without other circumstance, the same doth not amount to a Livery of seisin, but if he doe any act by which the intent of the Feoffor appear, that the Feoffee should have Livery and Seisin; as if the parties goe of purpose to the place intended to passe, to the intent that the Deed may be delivered in that kind, the same doth amount to a Livery, by Anderson, and the whole Court.

Mich. 32. and 33. Eliz. In Communi Banco.

CCLXXXVIII. Bradstocks Case.

R obert Bradstock seised in Fee of certain Lands, made a Feoffment in Fee to the use of himselfe in tail, and for want of such Issue to the use Estates of John Bradstock his Brother in tail, and for want of such Issue to the use of Henry Bradstock, another Brother in tail, Provided always, That if Conditions the said John or Henry doe goe about to a void any estate or demise by copy, made or to be made of the Premises, or any part thereof, that then his estate shal cease. Robert dyed without Issue, John entred and levied a Fine, Suc consuls de droit come ceo, &c. of the Land: And the opinion of the whole Court was, That this fine was not any offence against the said Proviso, for these words (made or to be made) doe not extend to estates made or limited by the said Feoffment, but only to estates before made, and to be made af-terwards.

Mich. 32 & 33 Eliz. In Communi Banco.

CCLXXXIX. Long and Hemmings Case.

I s a Quare Impedit by Long against Hemming and the Bishop of Gloucester, of the Church of Frombillet, upon the pleading the Issue was, If Thomas Long Father of the Plaintiff did enfeoff the Plaintiff of the Man-<sup>Quare Imp-
dit.</sup> noz of Frombillet, to which the Abbowlon of the said church was appendant be-fore he granted the Abbowlon to one Strengbain who granted it to the De-fendant, or not. And the Jury gave a speciall Verdict, scil. That the Ab-bot of S was seised of a capitall Messuage in Frombillet, and of one hundred Acres

Acres of Land there, And that there was a Tenancy holden of the said capitall Messuage by such Services, and that the said capitall Messuage had been knowne time out of mind, by the name of the Maner of Frombille, and that the Abovewon was appendant to it, and conveyed the said capitall Messuage and Abovewon to the King by the dissolution, and from the King, to the said Thomas Long, who so seised, without any Deed did enfeoff the Plaintiff of the said Maner, and made Libery and Seisin upon the Demesnes, And that the said Thomas Long by his Deed made a grant of the said Abovewon, to the said Strengtham, and afterwards the freeholder attorneed to the Plaintiff: And by the clear opinion of the whole court, here is a sufficient Maner to which an Abovewon may be well appendant, and that in Law, the Abovewon is appendant to all the Maner, but most properly to the Demesnes, out of which at the commencement it was derived, and therfore by the attorneement afterwards, within constriction of the Law, shall have relation to the Libery, the Abovewon did passe included in the Libery: And the grant of the abovewon made mesne between the Libery, and the attorneement was void, and afterwards Judgment was given, and a writ to the Bishop granted for the Plaintiff.

CCLXXX. Mich. 32 & 33 Eliz. In Communi Banco.

Debt.

A Made a Bill of Debt against B for the payment of twenty pounds at four dayes, scil. five pounds at every of the said four dayes, and in the end of the Deed, covenanted and granted with B, his Executors and Administratores, that if he make default in the payment of any of the said payments, that then he will pay the residue that then shall be un-paid, and afterwards A sailes in the first payment, and before the second day B brought an action of Debt for the whole twenty pounds. It was moved by Puckering Serjeant, That the Action of Debt did not lye before the last day incurred; And also if B will sue A before the last day, that it ought to be by way of covenant, not by Debt: But by the whole Court, the action doth well lye for the manner, for if one covenant to pay me one hundred pounds at such a day, an action of Debt lyeth, a fortiori, when the words of the Deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract, solum subjectum materii.

Mich. 32 & 33 Eliz. In Communi Banco.

CCLXXXI. Lancasters Case.

An Information was against Lancaster for buying of pretended Rights and Titles upon the Statute of 32 H. 8. And upon not guilty pleaded, It was found for the Plaintiff, and it was moved in arrest of Judgment, because the Informer had not pursued the Statute, in this, that it is not set forth, that the Defendant nor any of his Ancestors, or any by whom he claimed, have taken the profits, &c. and the same was holden a good, and materiall Exception by the Court: and although it be layed in the Information, that the Plaintiff himself hath been in possession of the Land by twenty years before the buying of the pretended Title, for that is but matter of argument, and not any expresse allegation, for in all penall Statutes the Plaintiff ought to pursue the very words of the Statute, and therefore by Anderson, It hath been adjudged by the Judges of both Bancis, that if an Information be exhibited upon the Statute of Usury, by which the Defendant is charged for the taking of twenty pounds for the Loane and forbearing of one hundred pounds for a Yeare, there the Information is not good, if it be not alledged

in it, that the said twenty pounds was received by any corrupt or deceitfull way or means: And in the principall Case, for the Cause aforesaid, Judg-
ment was arrested.

Mich: 32, & 33 Eliz: in the Common Bench.

CCLXXXII. *Bagshaw and the Earl of Shrewsburies Case.*

Bagshaw brought a ~~Writ~~ of Annuity against the Earle of Shrewsbury, ^{Annuity.} for the arrearages of an Annuity of twenty Marks per annum, granted by the Defendant to the Plaintiff, Pro Consilio impeasio & impendendo, The Defendant pleaded, that before any arrearages incurred, he required the Plaintiff to do him Service, and he refused, The Plaintiff by replication laid, that before the refusal, such a day and place the Defendant died, discharged the Plaintiff of his Service, &c. And the opinion of the Court was, that the Plea in Bar was not good, for he ought to have shewed for what manner of Service to doe, the Plaintiff was so retained, and for what kind of Service the Annuity was granted: and then to have shewed specially what Service he required of the Plaintiff, and what Service the Plaintiff refused. Another matter was moved, If the discharge shall be peremptory, and an absolute discharge of the Service of the Plaintiff, and of his attendance, so that as afterwards the Defendant cannot require Service of the Plaintiff. And by Walmesly Justice, it is a peremptory discharge of the Service, for otherwise how can he be retained with another Master: and so he should be out of every Service. Windham contrary, For herc the Plaintiff hath an annuity for his life, and therefore it is reason that he continue his Service for his life, as long as the annuity doth continue, if he be required: But where one is retained but for one or two yeares, then once discharged, is peremptory and absolute.

Mich. 31. and 32. Eliz in the Common Bench.

CCLXXXIII. *Matheson and Trots Case.*

Betwixt Matheson and Trot the Case was, Sir Anthony Denny seised of Certain Lands in and about the Town of Hertford, holden in Socage, and of divers Mannors, Lands, and Tenements in other places holden in chief by Knights-service, and having Issue two Sons, Henry and Edward, Devised by his last Will in writing, devised the Lands holden in Hertford to Edward Denny his younger Son in Fee, and died seised of all the Premisses, Henry being then within age: After Office was found without any mention of the said Devise, the Queen seised the body of the Heire, and the possession of all the Lands whereof the said Sir Anthony died seised, and leased the same to a stranger, during the Minority of the Heire: by force and colour of which Lease the Lessee entered into all the Premisses, and did enjoy them according to the Demise. And the Heire at his full age sued Liberty of the whole, and before any entry of the said Edward in the Land to him devised, or any entry made by the said Henry, the said Henry at London, leased the said Lands by Deed Indented to I. S. for years, rendering Rent, by colour of which the said I. S. entered, and payd the Rent diverse years to the said Henry: And afterwards by casualty the said Henry walked over the Grounds demised by him, in the company of the said I. S. without any speciall entry or claim there made, I. S. assigned his Interest to I. D. who entered in the Premisses, and payd the Rent to the sayd Henry, who died, and afterwards the Rent was payd to the Son and Heire of Henry: And after four and twenty years after

the death of the said Sir Anthony, the said Edward entered into the Land to him Discent, where devised by the said Devisee; and leased the same to the Plaintiff, &c. And takes away en- it was moved here, if this dying seised of Henry of the Lands in Hertford, and crie.

discent to his Heire, should take away the Entry of Edward the Devisee. And by Anderson clearly, If here upon the whole matter be a discent in the Case, then the Entry of Edward the Devisee is taken away, although that the Devisee at the time of the discent had not any Action or other remedy, for it shall be accounted his folly that he would not enter, and prevent the di- scent. But VVindham, Periam, and VValtesly Justices, were of a contrary opinion, for a Devisee by a Devise hath but a Title of Entry, which shall not be bound by any Discent, as Entry for Mortmain, for Condition broken, And after long deliberation they all agree, that there was not any Discent in the Case, for by the Devise, and the death of the Devisee, the Frank-tenant in Law, and the Fee was vested in the Devisee Edward: And then when the Queen seised, and leased the same during the Monage of Henry, and the Les- see entred, he did wrong to Edward, and by his Entry had gained a tortious Estate in fee, although he could not be said properly a Disseisor, nor an Abator: And afterwards when Henry after his full age, when by his Indenture he lea- sed without any speciall Entry, ut supra, and by colour thereof the Lessee en- tred, now he is a wrong Doer to Edward the Devisee and by his Entry has gained a wrongfull possession in Fee: and then the paying of the Rent to Henry, nor the walking of Henry upon the Land without any speciall claim, did not gain any Seisin to him: and so he was never seised of the Land, and could never dye seised, and then no Discent; and then the Entry of Edward was lawfull, and the Lease by him made to the Plaintiff was good: And so Judgment was given for the Plaintiff.

Mich. 32, & 33 Eliz. in the Common Bench.

CCLXXXIV. Greenwood and Welden Case.

Replevin.

In a Replevin between Greenwood and Welden; The Defendant made Connulsans as Bayliff to John Cornwallis, and shewed how that seven acres of Land called Pilles, is locus in quo: and at the time of the taking were holden of the said Cornwallis by certain Rent, and other Services: And for Rent arreare he made Connulsans, as Bayliff to Cornwallis. The Plaintiff pleaded out of the Fee of Cornwallis, upon which they were at Issue: And it was found that the Plaintiff is seised of seven acres called Pilles, holden of Cornwallis, ut supra: But the Jury say, That locus in quo doth contain two acres, which is called Pilles, and these two acres are, and then were, holden of Agmondestham of the Middle-Temple: And if upon the whole matter, videbi- tur Curia, &c. And by the opinion of the whole Court, out of his Fee upon that matter is not found, for although it be found, that the two acres be holden of Agmondesth. yet it may be that they are within the Fee of Cornwallis, for it may be that Cornwallis is Lord Paramount, and Agmondestham Helne, and then within the Fee of Cornwallis: And therefore for the uncertainty of the Verdict, a Venire facias de novo was awarded.

Mich. 32. & 33. Eliz. in the Common Bench.

CCLXXXV. Bishop and Harecourts Case.

Affimpit.

In an Action upon the Case, The Plaintiff declared, that the 5. Junii, 30 Eliz. the Defendant (in consideration that the Plaintiff the same day and year, sold and delivered to the Defendant a Horse) did promise to pay the Plaintiff

plaintiff a hundred pounds in Trinity Term then next ensuing, and shew-
ed that the Term began 7 Junii after: And upon Non assumpsit pleaded, it
was found for the Plaintiff. And it was moved in arrest of Judgment, That
it appeareth upon the Declaration, that the Plaintiff hath not cause of Act,
viz, for the Trinity Term intended is not yet come, for the day of the Assump-
sion is the fifth of June, and the fourth day was the first day of the said Term,
scil. the day of Essoines, and the seventh day 4. die post, and then the promise
being made at the day aforesaid, after the Commencement of the said Term,
the same is not the Term intended, but the Plaintiff must expect the perfor-
mance of the promise untill a year after: And of that opinion was Anderson,
but the other Justit. s were strongly against him to the contrary, for
by common intendment amongst the people, the Term shall not begin untill
4. die post, and so it is set down usually in the Almanack; And afterwards
Judgment was given for the Plaintiff.

CCLXXXVI. Mieb. 32. & 33. Eliz. in the Common Bench.

Ooper Servant came to the Bar, and shew'd that A. Tenant in tail, the
Remainder over to B. in Fee. A. for a great summe of money sold the
Land to I. S. and his Heires, and for assurance, made a Recouery in Fee, and
leaved a Fine to the said I. S. to the use of the said I. S. and his Heires: And
notes, that by the Indenture of Bargain and Sale, A. covenanted to make
such further Assurance within seven daies, as the said I. S. or his Heires, or their
Councell should devise: And shew'd, that before any further assurance was
made, the said I. S. died, his Son and Heire being within age: And neare by
advice of Councell, and of the Friends of the Infant, it was devised that for
such further assurance and cutting off the Remainder, a common Recovery
should be suffered, in which the said Infant should be Tenant in the Precipes Common Re-
and should bouch the Wendoz, and because that the Term of seven yeares covery suffered
is almost expired, and that the said Recovery is intended to be unto the use by an Infant
of the said Infant and his Heires, it was pr. yed that such a Recovery might be received and allowed. And two Presidents in such Case were shew'd in the
time of this Queen; one the Case of the Earl of Shrewsbury, and the other one,
Wilemans Case: But the Justices were very doubtful what to do; But at
last upon good assurance of people of good Credit, that it was unto the use of
the Infant, and upon the appearance of a good and sufficient Guardian for the
Infant in the Recovery, who was of ability to answer to the Infant if he
should be deceived in the passing of that Recovery; and upon consideration
by the two Presidents, and upon Affidavit made by two witnessess, that
the late intended Recovery was to the use of the Infant, the Recovery was re-
cived, and allowed.

Mieb. 32. & 33 Eliz. in the Common Bench.

CCLXXXVII. Cottons Case.

It was found by speciall Verdict, that Berwick and Tefdall seised of certain
Laines, conveyed the same to Sir Thomas Cotton for life, the Remainder to Fines levied to
William Cotton, & primogenito filio suo, & heredi masculo & sic de primo-
genito ad primogenitum dict. William, the Remainder to the right Heirs of
the body of Sir Tho. Cotton, and William Cotton lawfully issuing, the Re-
mainder to the right Heires of Sir Thomas Cotton: William had ISSU a
Son borne here in England, and went beyond the Sea to Antwerp, and ther
continuing, and his Son being within age in England, Sir Thomas Cotton
levied

le died a Fine of all the Land, sur coulans ac droit come ceo, &c. And afterwards by Indenture covenanted to have seised to the use of himself for life, and afterwards to the use of Robert Cotton his Son in fee : William died at Antwerp, his said Son being within age in England, Sir Tho. Cotton died, Robert entered, and leased the Land for yeates to Sary, and the Infant Son and Heire of William leased the Land to one Chevoc at Mill, who entred and ousted Sary, who thereupon brought Ejectione firme. It was here holden by the Court, that Sir Thomas Cotton was Tenant for life, the Remainder to William for term of his life, the Remaider to the Heires of both their bodies issuing : So as unto one Property Sir Thomas Cotton had an Estate, tail dependant upon the said Estates for life ; and so the Fine leases by him was a Bar to the Issue of William for a Property. And as to the other Property they held that the said Fine was not any Bar, but that the party interest led at the time might avoid the Fine at any time during his Sonage, and five years after, for William his Father was not bound by the Statute of 4 H. 7. because at the time of the Fine he died, he was beyond the years, and although he never returned but died there, yet by the equity of the Statute his Issue shall have five years after his death to avoid the Fine, if he were of full age, and if he were within age, then during his Sonage, and five yeares after. At another day the Case was argued and put in this manner, viz. Lands were given to Sir Thomas Cotton for life, without Impeachment of Will, the Remaider over to Cheney Cotton his eldest Son, & primogenito filio & heredi Mascato, of the said Cheney, & sic de primogenito filio in primogenitum filium, the Remaider to the Heires Spales of the body of the said Cheney, and for want of such Issue, the Remaider to William Cotton his second Son, & primogenito filio, in primogenitum filium, the Remaider over to the said Sir Thomas, and the said William, and the Heires Spales of their bodies lawfully begotten. Cheney Cotton died without Issue, VVilliam having Issue, went beyond the Year, Sir Thomas Cotton, & Eliz. leased a Fine with Proclamation, and afterwards VVilliam the Father died in Antwerp, his Son being within age, Sir Thomas by Indenture limited the use of the Fine to himself for life, the Remaider over to Robert Cotton his third Son in Tail, Sir Thomas died (but it doth not appear at what time) VVilliam the Son being yet within age entered (but non constat quando) and Sir Eliz. leased the Lands to the Defendant at Mill. True Serjeant argues for VVilliam Cotton. And he conceiveth, that VVilliam the Father had an Estate-tail, and then the entry of VVilliam the Son was congeable for the whole : But admitting that it is not an Estate-tail in VVilliam the Father for the whole, yet he hath by the second Remaider an Estate-tail in the Property, and then his Entry good as to one Property ; and then Robert being Tenant in Common of the other Property, his Lessee without an actuall Ductor cannot maintain an Ejectione firme against the Lessee of his Companion. And he conceiveth here is a good Estate-tail in VVilliam Cotton by virtue of the Limitation to VVilliam, & progenito filio & heredi Mascato ipsius Guliel. & sic de primogenito filio in primogenitum filium, &c. for according to the Statute of VVest. 2. the will of the Donor ought to be observed, and here it appeareth that the intent of the Donor was to create an Estate-tail, although the words of the Limitation do not amount to so much. And the Estates mentioned in the Statute aforesaid, are not Estates for Entails, but onely Examples, as it is laid by Trew, 23 E. 3. F. Tail, and see Robeiges Case, 2 E. 2. 1 Fitz. Tail : and 5 H. 5. 6. Land given to A. and B. uxori ejus, & heredibus eorum & aliis heredibus dicti A. si dicti heredes de dictis A. & B. exequentes obierint fine heredibus de le, &c. and that was holden a good Entail ; so a gift to one and his Heires, si heredes de carne sua habuerit & si nullos de carne sua habuerit reveretur terra, and adiungere a good tail : See 39 E. 3. 20. Land given to Pushana and his wife, & uni heredi

Estates;

Tailes.

de corpore suo legitime procreat. & uni heredi ipsius heredis tantum, And that was holden a good Taile; and so he conceiveth in this Case, that although the words of the Limitation are not apt to create an Estate-tail according to the phrase and stile of the said Statute of West. 2. yet here the intent of the Donor appears to continue the Land in his Name and blood, for William the Son could not take with his Father by his Limitation, for he was not in *re cum natura*, and therefore all shall vest in William the Father; which see 18 E. 3 Fitz. Feozments & Fait, 60. Now it is to see, if upon the Limitation to Sir Thomas Cotton and William his Son, by which the Remainder is limited to Sir Thomas Cotton and William, and the Heires Males of their bodies issuing, the said Sir Thomas Cotton and William have a joyned Estate-tail, in respect that the Issue of the body of the Son, may be Heire of the body of the Father: and so because they might have one Heire which shall be inheritable to his Land, it shall be one entire Estate-tails in them: But he conceiveth that they are severall Estate-tails, and that they are Tenants in Common of an Estate-tail, 3, & 4 Phil. & Mar. Dyer 145. Land given to the Father and Son, and to the Heires of their two bodies begotten, the Remainder over in Fee, the Father dieth without other Issue, then the Son only, and afterwards the Son dieth without Issue, a Stranger abates: Or if the Son hath made a Discontinuance, if he in the Remainder shall have but one or two severall Formedons was the Question. And by Saunders, Brook, and Brown, but one Formedon, and Quare left of it; yet admitting that, yet notwithstanding that, it might be that they had severall Estate-tails, 17 E. 3. 51. 78. Land given to a man and his Sister, and to the Heires of their two bodies issuing, they have severall Estate-tails, and yet one Formedon. And see 7 H. 4. 83. Land given to a man and his Mother, or to her Daughter in Taile, here are severall Entailles. And here in the principall Case, Sir Thomas Cotton hath one Poverty in Taile expectant upon his Estate for life: and therefore as to the Poverty of Sir Thomas Cotton he is bound by the Fine. And the other Poverty is left in the Son, who may enter for a Forfeiture upon the alienation made by his Father, as well in the life of the Father, as afterwards. Now after this Fine levied, the entry of William the Son by virtue of his Remainder is lawfull after the death of Sir Thomas, although that VVilliam the Father was beyond the Sea at the time of the Fine levied, and there afterwards died, VVilliam the Son being within age. The words of the Statute of 4 H. 7. are, Other then Meomen Codret, or out of this Realm, &c. so that they or their Heires make their Entry, &c. within five years after they return into this Land, &c. So that by the bare letter of the Act, VVill. the Son hath not remedy, nor release by this Act against the Fine, because that VVilliam the Father died beyond the Sea, without any return into England, &c. by the Equity of the Statute he shall have five yeares to make his Claim, although his Father never return, for if such literall construction shoulde be allowed, it shoulde be a great mischiefe, and it shoulde be a hard Exposition, for this Statute ought to be taken by Equity, as it appeareth by diverse Cases, 10 H. 8. 6. My Uncle doth disesse my Father, and afterwards levies a Fine with proclamations: my Father dieth, and after within five yeares my Uncle dies, that Fine is no Bar to me, yet the Exception doth not help me, for I am Heire to him that levied the Fine, and so pridy to it, but my Title to the Land, is not as Heire to my Uncle but to my Father: So if an Instant after such a Fine levied, dieth before his full age, his Heir may enter within five yeares after, and yet that Case is out of the Letter of the Statute. And by Brown and Sanders, If the disseisor dieth, his wife enjoint with a Son, the disseisor levyleth a Fine, the Son is born, although this Son is not excepted expressly by the words, because not in *re cum natura* at the time of the Fine levied &c. yet such an instant is within the equity and meaning of the said Statute. See the Case betwixt Stowell and Touch, Plow. Com.

366. And by him, It was holden, 6. Eliz. that an Infant brought a Forfeiture within age, and adjudged maintainable, although the words of the Statute be, That they shall take their Actions or lawfull Entries within five years after they come of full age: And he also argued, that here, when Sir Thomas being Tenant for life, levied a Fine, which is a Forfeiture, he in the Remainder is to have five years after the Fine levied, in respect of the present forfeiture, and also five years after the death of the Tenant for life: And that was the case of one Some adjudged accordingly in the Common Pleas: It hath been objected on the other side, That the Defendant entred by color of the Lease at Will made to him by William who was an Infant, that he was a Dilector as well to the Infant as to the Lessor of the Plaintiff; who had the moiety as Tenant in common with the Infant, and then when the Lessor of the Plaintiff entered upon the Defendant, and leased to the Plaintiff, and the Defendant entered and ejected the Plaintiff, he is a Dilector; to which he answered, That the Defendant when he entered by the Lease at Will, he was no Dilector, for such a Lease of an Infant is not void, but only voidable, &c. and then a sufficient Lease against the Plaintiff, although not against the Infant. Beaumont Serjeant, to the contrary; By this manner of gift, William the Son took nothing, but the estate settled only in William the Father, but not an estate tail, by the words, heredi masculo, &c. And voluntas Donatoris, without sufficient words cannot create an estate tail, but where the intent of the Donor is not according to the Law; The Law shall not be construed according to his intent, but his intent shall be taken according to the Laws; And he held that Sir Thomas and William had severall estates in tail, and severall moieties, and not one entire estate, and hers, upon all the matter, Sir Thomas is Tenant for life of the whole, the Remainder of one moiety to him in tail, the Remainder of the other moiety unto William in tail, and, rebus sic stantibus, Sir Thomas levying a Fine of the whole, now as to one moiety which the Tenant has in tail, the Fine is clearly good, and so as to that, Robert the Lessor of the Plaintiff hath a good title, as to the said moiety, and as to the other moiety he conceived also, that William is bound, for this Statute shall not be construed by Equity, but shall binde all who are expressly excepted, and that is not William the Son, for his Father never returned, and then his Heire is not relieved by the Statute; Also William had a Right of Entry at the time of the Fine levied, scil. for the Forfeiture, and because he hath succeeded the time, for the said Right of Entry, he shall not have now five years after the death of Tenant for life, for he is the same person, and the second, saving which provides for future Rights, extends to other persons then those who are intended in the first saving, and he who may take advantage of the first saving, cannot be relieved by the second saving, for no new title doth accrue to him in the Reversion or Remainder, by the death of Tenant for life, for that title accrued to him by the Forfeiture, so as the title which he hath by the death of the Tenant for life, is not the title which first accrued unto him; Also by this Forfeiture, the estate for life is determined as if Tenant for life had been dead, for if Tenant for life maketh a Feoffment in Fee, the Lessor may have a Title of Entry, ad terminum qui praterit. Fitz. 201. which proves, that by the Forfeiture the estate is determined, and then no new title doth accrue to him in the Remainder, by the death of the Tenant for life, but that only which he had before the alienation, so that his non-claim after the five years shall bind him. Then, when William the Infant having a Right to a moiety, and Robert the Lessor of the Plaintiff a Right to the other moiety, and the Infant leases unto the Defendant at Will, who en-
treth, now is he a Dilector as well to Robert as to the Infant: Then if the Defendant be Dilector and hath no title by the Infant, Robert who hath Right in a moiety may well enter into the whole, for he hath the possession per

per my & per tout by his Entry, and then when the Defendant doth eject him, he hath good cause of Action. And after at another day the Case was moved, and it was a greed, That soz one moyety the Infant is bound, soz Sir Thomas had an estate tail in a moyety, soz he was Issue of the body of the Conqueror, but for the other moyety, the Fine levied by Tenant soz life, William the Father being then Tenant beyond the Sea, It was holden by Anderson, Windham, and Walmesley, that the Infant was not barred, notwithstanding the objection abovesaid, That William the Father never returned into England, and notwithstanding the words of the Statute of 4 H. 7. And by Walmesley, If an infant make his claime within age it is sufficient to avoid the Fine, and yet the said Statute seems to appoint to him time within five years after his full age, so that according to the very words, a claime made before or after should be vain, yet in Equity, although he be not compellable to make his claime untill the time allowed by the Statute, yet if he make it before, it is good enough. And by Anderson, Although that William the Father did not returne, yet if he makes not his claime within four years after the death of his Father being of full age, and without any impediment; &c. he shall be barred, If in such case a man hath many impediments, he is not compellable to make his claim when one of the impediments is removed, but when they are all removed. So if the Ancestoz hath one of the said impediments, and dyeth before it be removed, and his Heire is within age, or hath other impediment, he is not bound to make his claime till five years after his impediment is removed. And Somes case cited before was holden and agreed to be good Law, soz the Forfeiture may not be knowne unto him, And as to the objection against the Lease at Will, because it was made by an Infant, and no Rent reserved upon it, nor the Lease made upon the Land, and therefore the Lessee should be a Disseisor, To that it was answered, Be the Defendant a Disseisor, or not, it is not materiall here, soz if the Plaintiff hath not title according to his Declaration, he cannot recover, whether the Defendant hath title or not, soz it is not like unto Trespass where the very without other title is good, contrary in Actions against all who gave not title, but in Ejectione firmæ, if the title of the Plaintiff be not good and sufficient, be the title of the Defendant good or not, he shall not recover : And afterwards Judgment was given for the Defendant; Hill. 33. Eliz.

Mich. 32 & 33 Eliz. In Communi Banco.

CCLXXXVIII. Cheyney and Smiths Case.

Is an Ejectione firmæ by Cheyney and his Wife against Smith : The Plaintiffs declared upon a Lease made by the Master of the House or Colledge of S. Thomas of Action in London to 15 who assigned it over to Knevir, who by his Will devised the same to his Wife, who he made also his Executrix, and dyed, and afterwards shee took to Husband one Waters, and dyed; Waters took Letters of Administration of the Goods and Chastells of his Wife, and afterwards leased to the Plaintiffs : And upon not guilty they were at Issue. And it was given in Evidence, That the Lease given in Evidence, was not the Lease wherof the Plaintiffs had declared, soz the original Lease shewed in Court, is Master of the House or Hospital, where the Lease specified in the Declaration is, Master of the House or Colledge, 38. L. 3. 28. And some of the Justices conceived that there is not any materiall variance (but if the parties would, it might be found by speciall Verdict) soz by them Colledge and Hospital are all one. And afterwards the Court moved the Plaintiffs to prove if the wife were in as Executrix, or as Legatee;

tee, soz by Anderson, and Periam, untill election be made he shall not be said to have it as Legatee, especially if it be not alleadged in fact, that all the debts of the Testator are paid, and Anderson doubted, although that it be alleadged, that the debts be paid. If the Executor shall be said to have the said Lease, as a Legacy before the hath made Election, vi. Weldens Case, and Paramonts Case in Plowd. And afterwards it was given in Evidence, That the wife after the death of the Husband had repaired the Bankes of the Land, and produced Witnesses to prove it, as if the same shold amount to claime it as a Legacy, and the Court said, that that matter shold be referred to the Jury: And it was further shewed in Evidence, that the said Wife Executrix, and her said Husband Waters formerly made a Lease by Deed, reciting thereby, that where the Husband was possessed in the right of his said Wife as Executrix of her first Husband, &c. And by the opinion of the whole Court, the same was an expresse claime as Executrix; and then when the Wife dyed, if the Husband would have advantage of it, he ought to take Letters of Administration of the Goods of her first Husband, and not of the Wife, but if shee had claimed the Land and the Term in it as Legatee, and had not been in possession, Administration taken of the Rights and Debts of the Wife, had been good as to that intent, that his Wife was not actually possessed of it, but only had a Right unto it, and of such things in Action, the Husband might be Executor or Administrator to his Wife, but here they have failed of their title: The Administration being taken of the goods of the Wife, where it shold be of the Goods of the Testator the first Husband. And for this cause the Plaintiffs were non-suit, and the Jury discharged. And it was agreed by all the Justices, that if the Wife before Election had taken Husband, that the Husband might have made the Election in the Case aforesaid.

Mich. 32. and 33. Eliz. In Communi Banco.

CCLXXXIX. *The Lord Cobham and Brownes Case.*

The Case between the Lord Cobham and Browne, was, that the Abbot of Grace was seised of the Mannor of Gravelsend in the County of Kent, which Mannor doth extend to the Parishes of Gravelsend, and Milton, and that the said Abbot and all his Predecessors, &c. time out of mind, &c. have had a Water-Court within the said Mannor, which Court had been holden at Gravelsend Bridge in the end of it, and that all the Inhabitants within the said Parishes, which have Boates either entirely or jointly with others, and have used to transport or carry passengers from Gravelsend to London, &c contr. and have used to fasten their Boates at the said Bridge of Gravelsend, have used to do suit at the said Court, and there have used to enquire of all mis-orders, and mis-demeanours of Water-men there, and that the said Abbots, &c. have used to have the Fines and Amercements of the same Court, and conveyed the said Mannor to the Plaintiff, and that at a Court there holden, The Defendant being sworne with the residue of the Enquest to enquire of such dis-orders, refused to give his Verdit, soz which soz the said contempt, the Defendant, by the then Steward was amerced twenty shillings, soz the which Amercement the Plaintiff brought an Action of Debt: It was moved by Beaumont Serjeant; That the Action did not lye, for the Prescription upon which the Action is grounded is not good, first, he claimes to have this Court within his Mannor, and as a thing appertaining to it, and yet he claimes suit at his Court of all the Inhabitants of the said two Parishes, and to have them Suitors at it, being mere strangers to the Mannor, and which do not hold of it, s^rz although it be alleadged, that the said Mannor doth extend in

in the said Parishes, yet the same doth not prove that every part of the said Parishes is within the said Mannor, and if it be not so, the Prescription may extend as well to all the County of Kent, as wel as to the said two Parishes, for such a Prescription cannot bind but those which are Tenants of the said Mannor, and cannot extend to Strangers, which see 21 H. 7. 40. The Case of Pound-breach. Secondly, it is not alleadged here, that the Steward ought and had used to assesse Amercements, for by the common Law no Steward hath authority to assesse Amercements or fines in a Court Baron, for there the Suitors are Judges and not the Steward, and that this Water-Court is a Court Baron, it appeareth by the Declaration, for there it is said that it is a Court belonging to such a Mannor, and that prima facie shall be meant a Court Baron, if the contrary be not shewed, vi. Fitz. 75. g. Thirdly, it is not shewed that the Amercement was affterred, which see ib. 75. Harris Sergeant, to the contrary: This Court upon the whole matter is in the nature of a Leet, for the redresse of mis-orders between the Watermen, and the prescription here will warrant such a Court well enough, Ans there are many Courts in England which are not Court Barons, but grounded upon Prescription, 20 E. 3. 17. The Court before the Chancellor of Oxford, Prescription to have Swan more, and it is reason that this Prescription should hold place, for here is quid pro quo, for the Watermen receive their carriage and loading at this Bridge, and also discharge their loading there, and they use to fasten their boates there, and therfore in view of that benefit, it is reason that they be attendant at the Court which is upon the said Bridge, and upon that reason is the Prescription of Toll Traverse, 5 H. 7. 9. And to have a Land Bird, 2 R. 3. 15. And toll of every Tassell which passeth the River, 21 H. 7. 16. And this Court may be a Court within the Mannor, and yet no Court Baron, but in the nature of a Leet, and the Prescription shall be good in Law by reason of the recompence to the Suitors, and then, if it be not a Court Baron, but rather in the nature of a Leet, then it followes, that the Suitors are not Judges but the Steward, and it behoves not to prescribe for the Amercement, for that is incident to a Court Leet, for otherwise how can the Suitors be compelle to doe thair suit at it, or their defaults, or contempts at the same be punished? and as to the afferring of the Amercement, it needs not here, for it is a fine for the open contempt, and despite done unto the Court, and not an Amercement, and it may well be assed by the Steward alone, vi. 23 H. 8. Br. Leer, 37. Drill Sergeant, to the contrary: For this Prescription is not reasonable, to drive Strangers to the suit at a Court Baron, for there is sufficient consideration in the Case of Tenants of the Mannor, for it may be at the beginning, the Tenancies were given upon such consideration to doe such suit: But in the principall case, the Prescription is their ground, and therefore unreasonable, because without consideration, 22 E. 4. 43, see the case there, and 21 H. 7. 20. It custome al- leanged, that if any Tenant distraigne the Beasts of another, Damage feasant, That he ought to bring such Beasts to the pound of the Lord of the Mannor, and if not, That at the next Court he should be amerced twelve pence, and the same was holden no good custome, because against common Right and common Law: Pockering Sergeant: If this Court shall be reputed in Law a Court Baron, then the Prescription, for the manner of it is not good, for in such case, the Amercement cannot be assed by the Steward, But he hold, that this court is in the nature of a Court Leet, and not a court Baron, and all Inhabitants within the Precinct of it, are bounden to doe their suit at it by reason of their Residancy, and their trade there, if they have Boates, or Quayes in Boates, and such court is for the better government of such Watermen, and the exercise and practise of their trade, and for the redressing of misdemeanours betwixt them, and so this court hath a reasonable commencement, being instituted for the publick good, and if customes which concerne the

private benefit of any be allowable; as the Mayors and Burgesses of a Towne prescribe to have of every Man which cometh in any shipp into their Port, and put upon the Land &c. for Toll. See 21 H. 6. A fortiori, a Custome or Prescription which concerns the publick good, is good: & it is not strange that such Court hath been maintained by Prescription, for the Court of Standardis is so without any commencement or erection, but by Custome. And although that of a thing Toll cannot be paid at any Market for things brought to Market, but for things sold, yet by custome Toll shall be paid for every thing brought to Market, and for the Banding of the Helle there; for the sale of Victuals is for the good of the Common wealth, which thing is the ground of the Prescription in the principall Case, and therefore the Prescription in the manner of it is good; and if the prescription be good for the Court, then to have a Steward to keep the Court, to assesse Fines for contumies & disorders is good without any speciall prescription, for it is incident to it. Periam Justice, If it be a Court-baron then cannot the Steward impose or assesse any Fine: which Windham granted, but he conceiv'd it is not a Court-baron, but a Court by prescription. Periam, If the Plaintiff claim it as belonging to his Mannor, it shall be intended a Court-baron, but yet a man may have a Court within his Mannor by prescription, which is not a Court-Baron. Anderson was of opinion that it is not a Court-baron, for although he doth reclaine to the Mannor, yet that is not any proof that it is a Court-baron: For a Leet may be appertaining to a Mannor. It was adjourned.

Mich. 32 & 33 Eliz. In Communi Banco.

CCC. Green and Edwards Case.

Between Green and Edwards the Case was this, Land is demised to A. for Braine years, if he shall so long live, and if he dye within the Term, that B. his Wife shall have it durante toto residuo termini predicti. The Husband dyeth during the Term: If the Wife shall have the residue of the Term was the Question. And by Periam and VValmesly Justices, by the death of the Husband the Term is determined, and therupon nothing can remain, especially by way of grant, but by way of Devise it might be. See 9 Eliz. 253. A Lease for forty years to A. if he shall live so long, and if he dye within the Term, that B. his Wife shall have the residue of the years: Where it was holden, that by the death of A. the Term is determined, and then there is no residue, and so the Limitation is void, vide 3 & 4 Phil. & Mar. 150. Anderson, If the Husband and Wife had been parties to the Deed of Demise, then the residue of the Term should go to the Wife after the death of the Husband; and this way (Terminus) shall not be taken for the Interest which is given to the Husband, but for the time, so it is as much as to say, that if the Husband dye before the forty years expired, that then his Wife shall have the residue for forty years; and it is reason to make such construction rather then so construe the laid part of the Deed to be void: For if in the construction of this Grant, the Term shall be taken for the Interest, then the Limitation shall be void. And in all Grants, the Deeds shall be taken most beneficially for the Grantee, and most strongly against the Grantor, especially ut res magis valcat quam pereat: And here are severall Grants and severall Terms: But if such matter be limited to the Wife not named in the Deed, all is void, for it is uncertain when the Term shall begin, and it cannot best during the particular Estate, and it is not certain, whether the Husband shall survive the Term, or not. And by VValmesly and Windham the said Limitation is merely void: As is a Term grants all his Term for so many years as shall be behind after his death, the same is a void Grant, for the Lessee may over-live all the Term, and then

then it is uncertain when it shall begin: And in this Case this inio[n] Term, shall be taken for the Interest, and not for the time, vide 35 H.8. Br. Conditions 203. vide C. 2. part, in the Recoz of Chedingtones Case, this Case bounched.

Mich. 32, & 33 Eliz. In the Common Bench.

CCCI. Gawton and the Lord Dacres Case:

In Debt upon Surplusage of an Acco[mpt] by Gawton, against George Lord Dacres; It was laid by Periam Justice, and not denied by any, that if I make J.S. my Auditor, generally to take Acco[mpts] of all my Bayliffs and Receivors, that he is not a sufficient Auditor without a Patent; for when a man is made an Auditor generally, he is an Officer, and an Officer cannot be without a Deed. But if a Bayliff, or Receiver be accountable to me, it is as clear on the other side, that I may appoint one to be my Auditor to take the acco[mpt] of him, pro hac vice by word; which Anderson granted: But if he afterwards takes an acco[mpt] of any by force or colour of the said Warrant without my Commandment, he is not a sufficient Auditor to such intent, either to take the acco[mpt], or to assels the arreages if the accountant be found in arrear, or to make allowance if he be found in Surplusage: And by him, If one become my Bayliff of his own wrong, without my appointment, he is accountable to me, but I am not compellable to make him any allowance for his Expences about my businels. And if I assigne to such Bayliff of his own wrong an Auditor, he cannot make allowances of such Expences. Anderson, If my Auditor make allowance to my Bayliff for any collateral Expences, which he hath expended in my affaires, which do not concern my Panno[r], wherof he is Bayliff, such allowance shall not bind me. And note, that in this Action the Plaintiff declared that he was Bayliff to the Defendant of certain Panno[r], Receiver of certain monies, and so retained ad diversa negotia procurandam: And upon acco[mpt] the allowance was made unto him for his Board-wages, and other Expences in riding Circa negotia. And by Anderson, these allowances shall not bind the Defendant; for as Bayliff of a Panno[r], no Expences shall be allowed unto him, but those which the Bayliff hat) expended within the Panno[r]: And if I retain one to go about my businels, he is not accountable. Windham, If I retain one to follow my businels, and deliver to him money to disburse in such businels, he is accountable. Anderson, It is so truly, but it is not in respect of the said Retainer, Devilis: but as he was Receiver, and if he expend more then he hath received, he doth it without warrant and no allowance shall be made unto him. If the Bayliff be found in Surplusage in the conclusion of the acco[mpt], the Auditor ought to enter. Allocato[r] super determinationem Compt. in surplagius, so much for such and such Expences, allocatis allocandis upon the next acco[mpt]: But in this Case it appeared upon the Evidence, that the Entry upon the foot of the acco[mpt] was, And so he is in Surplusage upon the determination of this acco[mpt] twenty six pounds: But the Auditor being examined, said, that it was not his meaning to allow unto him so much, but only to find and expesse the certainty of the whole acco[mpt], and so refer the allowance of it to the Defendant to whom he was Auditor: and upon that the Court said to the Jury, if they believed the Auditor, that they should find against the Plaintiff, for upon the matter here is not any acco[mpt], and so no allowance for the allowance if it had been according to Law ought to be entred, before Allocato[r], &c. and such allowance is as a Judgment, but here is not any allowance, for the Auditor did refer the same to the Defendant: But if the Jury doth not give credite to the Auditor, then the Court moved the Jury to find

it specially that the party was Auditor without Deed, and the finding of the account as it is set down in the Declaration, and the manner of the conclusion of it, viz. That the Plaintiff was in Surplusage upon the determination of the account for his Expences in riding Circa negotia defendantis, and for his Board-wages twenty six pounds.

Mich. 32, & 33 Eliz. in the Common Bench.

CCCII. Chamberlayns *Case.*

In this Case it was moved, Whether Beasts taken in Withernam, might be used and worked by the partie as his proper Beasts : And it was said by the Court, that Beasts distrainted, as Cows, could not be milked, nor Horses wrought, but they ought to be put in the Pound open, and there the Owner might milk them and fother them. But if Cows be taken in Withernam, because they are delivered to the partie in lieu of his own Cattell, he may milk them, or if they be Oxen, or Horses reasonably work them, otherwise he shalbe at great charges of keeping and pasturing of them, and no profit, or consideration for it. Anderson, It should be a great inconvenience to the Commonwealth : For if the Cows are not milked, the milk is lost, and also the Cows impaired thereby.

Mich. 32, & 33 Eliz. in the Common Bench.

CCCIII. *Byne and Playnes Case.*

Asumpc. **I**n an action upon the case by Byne against Playne, the Plaintiff declares, that whereas he himself had recovered against Thomas Ward in the Court of the Queen in Southwark, holden before Omesley Steward there for the Mayor of London, the summ of twenty pounds, and had obtained out of the said Court a Laver facias directed to the Bayllif to do execution upon the Goods of the said Thomas Ward, which then were in the possession of the said Plaintiff, and where the said Bayllif by vertue of the said facias was ready to have done execution of the said Goods ; the Defendant came to the now Plaintiff, and assumed to him, that in consideration that the said Plaintiff would deliver to the Defendant the said Goods, that he would in fourteen daies after Michaelmas next pay to the Plaintiff twenty pounds, or otherwise deliver to him the said Goods again, if in the mean time no other makes Title unto them, and prove them to be his own Goods. And further, that the Plaintiff shall have free ingress and regresse to a Chamber in the house of the Defendant in the meantime. And upon Non-assumpc. pleaded, it was found by the Jury, that such a Recovery was in the said Court, and that the Defendant did assume, &c. But they further say, that before the said Recovery, the said Thomas Ward was possessed of the said Goods as of his own proper goods : And, by Deed indentured, sold them to his Brother R. Ward, in consideration of a certain summ of money, with a Proviso, that the said Thomas Ward, notwithstanding the said sale shoule have the possession of them for four years, which are not yet expired, paying to the said R. Ward twenty shillings by the yeare, and if, at the end of the said four yeares, the said Thomas did repay the said summ of money to the said R. Ward, that then the said sale shoule be void. And they further say, that the said Robert Ward made Title to the said goods by vertue of the said sale. Exception was taken to the Declaration, because it was not shewed by what authority or Title the Court was holden ; Also it sheweth, that the Bayllif was ready to do Execution upon the said Goods, but

but vold not shew where the said goods then were, but the exceptions were not allowed, for these matters are but inducement and conveyance to the action, and not the matter, or substance of it : Another exception was taken, because the request is not sufficiently alledged : *Licet sapis requisitas*, but that exception was not allowed, for here the Assumpst is to pay at a certaine day, and then the request is not materiall, but where a Request is parcell of the Assumpst, there an expesse Request ought to be taxed, as if the payment should be upon Request. As to the matter in Law, here is not any consideration, for the goods were not subject to execution, for Thomas Ward had but a speciall property in them, but the generall property was in R. Ward, and so no cause to deliver them back to the Plaintiff, and here by the Verdict the sprain title is prob'd, for proof ought to be by Verdit, which see Perk. 154. 1. & 7. R. 2. t. Bar 241. For it appeareth, before the said Recovery, Thomas sold the goods with promise, ut supra. Although it be found that R. Ward had the generall property, yet Thomas had the speciall and present property, and that against R. Ward himselfe, so that during the said fourteene years R. Ward could not entremedle with the goods, and though that no execution can be had against him who hath such a speciall property, yet that is not the case here, for here one who hath the possession of certain goods, delivers them to another, and in consideration thereof, he to whom the delivery is made, promiseth to re-deliver them unto the Baylee, or to pay so much money, this is a good consideration, when a lawfull property or title he hath who makes the Delivery. And of that opinion were all the Justices, for it appears, that the Plaintiff had a possession of the said goods, and that the said Thomas Ward had a speciall property, and because of such possession was chargeable to an action of the said Thomas Ward, be it that the Plaintiff comes to the said goods by baylement or Trover, scilicet by Periam, if goods come to another by Trover, and he delivereth them over, he is answerable to him who hath right unto them : The Delivery of these goods to the Defendant, is a good consideration, and the Defendant hath benefit by the use of them, and the property of the goods is not to be argued in this case, but the Delivery to the Defendant is the only matter : And because the Delivery of the goods to the Defendant, and the Assumpst upon it, it was helden, although the goods were not liable to execution, yet the Assumpst was good, and afterwards Judgment was given for the Plaintiff.

Mch. 32 & 33 Eliz. In Communi Banco.

CCCIV. Vandrink and Archers Cafe.

Vandrink brought an action upon the cafe against Archer, and declared, that whereas he himselfe was possessed of twenty seven Ells of Linnen cloth, as of his own goods, the same came to the hands of the Defendant by Trover, and he knowing the said goods to be the goods of the Plaintiff, sold them unto persons unknown, and the money thereof proceeding into contract to his own use : The Defendant pleaded, that as to twenty four Ells of the said Linnen cloth, long time before the losing, one Copland was possessed thereof, ut de bonis suis proprijs, and sold them to the Defendant, who before any notice that they were the goods of the Plaintiff, and before any request, sold them to persons unknown : And as to the other three Ells, he was always ready to deliver them to the Plaintiff, and yet is, and upon these Pleas, the Plaintiff did demur in Law. Owen Herjeant, for the Plaintiff, That both Pleas are insufficient, the first plea is not an answer but by argument, for the Plaintiff declares of a commission of his own goods, and the Defendant answers to a commission of his own goods, 33 H. 8. 1. Action

sur le case, 109. In an action upon the case the Plaintiff declares, that the Defendant found the goods of the Plaintiff, and delivered them to persons unknown. Non deliberavit modo & forma, is no Plea, but he ought to plead not guilty, and in an action upon the case, the Plaintiff declared, that he was possessed of certaine goods, ut de bonis suis proprijs, and the Defendant found them, and converted them to his own use; It is no Plea for the Defendant to say, that the Plaintiff was not possessed of the said goods as of his proper goods, but he ought to plead not guilty to the mis-demeanor, and gave in Evidence, that they were not the goods of the Plaintiff, and 4 E. 6. Br. action upon the case 113. The Plaintiff declared that he was possessed of certain goods as of his proper goods, and lost them; and the Defendant found them and converted them to his own use, the Defendant pleaded, that the Plaintiff pawned the said goods to the Defendant for ten pounds, for which he detained them according to the said pawn, and traversed the conversion, and by some it was holden, that he ought to plead not guilty, and give the especiall matter aforesaid in Evidence; and 2. & 3. Phil. and Ma. Dyer 121. The case of the Lord Mountegle, in an action upon the Case, the Plaintiff declared, upon a Trover of a chayne of Gold, and that the Defendant had sold it to persons unknown, the Defendant pleaded, That ipse non vendidit modo & forma, and upon that the Plaintiff did demur in Law, and see 27 H. 8. 13. Where goods come to one by Trover, he shall not be charged to an action, but for the time he hath the possession; But that is to be intended in an Action of Detinue, and not in an action upon the Case, for such action upon the Case is not grounded upon the Trover, but upon the mis-demeanor, that is, the Conversion. And as to the other Plea it is utterly insufficient, for the Plaintiff declares of a Conversion, and he pleads a possession, that he is alwayes ready, and so doth not answer to the point of the action. Yelverton Herjeant, to the contrary, and he conceived for the first Plea, that it is a direct answer, for he hath justified his sale to persons unknown, for that he hath bought the goods of one Copland whose goods they were, and because the Plaintiff hath demurred upon the Plea, he hath confessed the truth of the matter contained in it, scil. that the property of the goods was to Copland, and so in the Defendant by the said sale, and then he hath good cause to convert them to his own use by sale or otherwise; And he conceived, that there is a difference, 27 H. 8. 13. betwixt Layment, and Trover, for in case of Trover, the party is not chargeable but in respect of the possession, which being removed, the action is gone agaist the Finder, for he who findeth goods is not bound to keep them, nor to give an account for them. And he put the case reported by Dyer, 13. & 14. Eliz. 306, 307. R. Fines brought an action upon the case, and declared, he was possessed of a Hawk, as of his proper goods at W. and casually lost it at B, and that it afterwards casually came to the hands of the Defendant by Trover, and that he knowing it to be the Plaintiffs Hawk, sold the same for money to persons unknown; The Defendant pleaded that the Hawk first after the losing of it came to the hands of one Feosryes, who sold it to one Rowly who gave it to the Defendant at A, who sold it to Poulton, and the same was found a sufficient Bar, and it is hard where goods, as Wren or Hozles come to another by Trover, that he should be charged to keep them and pasture them until the Owner claimeth them, and therefore it is not reason but that he discharge himselfe by the quitting of the possession of them. And as to the other Plea, the matter of the Plea is good enough, and the defect is but in the forme, which because the Plaintiff upon his Demurrer hath not shewed to the Court according to the Statute, he shall not take advantage of it, but the matter of the Plea is sufficient, scil. the finding, and the offer to deliver it to the Plaintiff. Anderson Justice, For the examination of the insufficiency of this Plea, the nature of the action, and the cause of it, is to be considered, the nature of the action, it is an action upon

upon the case, the cause, the Crover, and conversion; Then for the latter plea his readinesse, to deliver it. It cannot be any answer to the Declaration of the Plaintiff: For this action is not Debt or Detinue, where the thing it selfe is to be delivered, for in such case, the Plea had been good, but the Conversion is the speciall cause of this Action, which by this Plea is not answered, and for the other Plea, the Declaration is not answered by it. But here is some matter of justification, for when a man comes to goods by Crover, there is not any doubt but by the Law he hath liberty to take the possession of them, but he cannot abuse them, kill them, or convert them to his own use, or make any profit of them, and if he doe, it is great reason that he be answerable for the same, but if he lose such goods afterwards, or they be taken from him, then he shall not be charged, for he is not bound to keep them, and so he conceived Judgment ought to be for the Plaintiff. Windham Justice, neither Plea is good, as to the first Plea, he confesseth the conversion, but hath not conveyed unto himselfe a sufficient title to the goods by which he might justify the Conversion, for the Plaintiff declares of a conversion of his own goods, and the Defendant justifies, because the property of the goods was in a Stranger who sold them to him, which cannot be any good title for him without a Traverse, unlesse he had shewed, that he bought them in an open Market, and then upon such matter he might well have justified the Conversion, and as to the other Plea, the same is naught also, for the goods are not in demands, and then the said Plea is not proper to say, that he is ready to deliver them, for damages only for the conversion are in demand, and not the goods themselves, and therefore the same is a Plea but by Argument, scil. He is ready to deliver, Ergo, he hath not converted, and yet the same is not a good argument, for if a man find my Horse, and rides upon him, whereby he becomes lame, or otherwise by excesse travell mis-aleth him, was my Horse the worse thereby; He may be ready to deliver me my Horse, and yet this action will ly, for such an abusing of the Horse is a Conversion to his own use: Periam Justice; The latter Plea clearly is insufficient, for it amounteth but to Not guilty, but for the first Plea, he doubted of it, for first the property is not traversable, nor the knowing, but upon the generall Issue pleaded, such matter may be given in Evidence, and he conceived, That where a man buyes goods of one who comes to them by Crover, that he may sell them, and shall not be answerable for them, And although it may be said, that the said matter may be given in Evidence, yet it is not good to put the same to the people, but to refer the matter to the Judgment of the Court: Walm. Justice. The latter Plea is clearly insufficient, but for the first he doubted of it, for he conceived, that the sale of the goods is not a Conversion: Anderson, The first Plea is, ut supra, and nothing in that is materiall or traversable, for all the Plea may be true, and yet the Defendant is guilty, for it may be that the Defendant himselfe sold them to the Plaintiff, or to another who sold them to the Plaintiff, and that afterwards the Defendant found them, and here the Conversion is confessed, and not so shewed by sufficient justification, and by him, the sale to persons unknown is no good Plea, for his sale is his own Act, and it cannot be but he must have notice of the buyers, and therefore he ought in his Plea to shew their names: Periam, Contrary to that matter as to the naming of the buyers, for it shoud be an infinite thing for a Draper to take notice of every one who buyeth an Ell of Cloth of him: And afterwards the same Clerme Judgment was given for the Plaintiff upon the insufficiency of the Plea.

Mich. 32, & 33 Eliz. in the Common Bench.

CCCV. Walgrave against Ogden.

Trover and Conversion.

A ^P action upon the case was brought upon a Traber and conversion of twenty barrels of Butter, and declared, that by negligent keeping of them, they were become of little value, upon which there was a Demurrer in Law: And by the opinion of the whole Court upon this matter, no action lieth; For a man who comes to Goods by Trover, is not bound to keep them so safely, as he who comes to them by Paylment. Walmesley, If a man find my Garments, and suffereth them to be eaten with Moathes by the negligent keeping of them; No Action lieth: but if he weareth my Garments, it is otherwise, soz the wearing is a Conversion.

Mich. 32. & 33. Eliz. in the Common Bench.

CCCVI. Alexander and the Lady Greshams Case.

Debt for arreages of annuity

Devised.

A Lice Alexander, Administratrix to her last Husband, brought an Action of Debt for the arreages of an Annuity, against the Lady Grisham, Executrix of Sir Thomas Gresham her late Husband, incurred in the life-time of her late Husband Sir Thomas Gresham: The Defendant pleaded, that she has fully administered; the Plaintiff replied, Assets, scil. That the Defendant had divers Goods in her hands not administered, which were the goods of the said Sir Thomas at the time of his death, upon which they were at Issue. And it was found by special Verdia, that Sir Thomas Gresham being seized of divers Mannors and other Lands in Free, devised them by his last Will to his wife the Defendant, to use at her w^t pleasure. And by his said Will requested his wife to pay his Debts and Legacies: and further it was found, that at the Parliament holden 22 Eliz. a private Act was made, by which it was enacted, that the said Lady shoud take upon her the charge of all her Husbands Debts, and for the discharge thereof, she shall sell so much Land as will yeild so much mony as will serve for the payment of the said Debts, and if she shall faile therein, that then certain Commissioners shall be appointed for the sale of so much Land, &c. and for all such Debts as the said Lady shoud not acknowledge to be good and true Debts, that then the Creditors to whom they were due, shoud reapeire to the said Commissioners, and they shoud determine both of the certainty of the summe of the one Debts, and of the Damages for the forbearing thereof: and that afterwards the said Creditors shoud have their remedy against the said Lady for such summes of money so agreed upon by the said Commissioners: and found the Statute at large, and that the said Lady Gresham had sold certain Lands parcell of the Possessions of the said Sir Thomas, by which sale she had received the summe of twenty thousand pounds, which yet is unadministred for the greatest part of it. And if upon the whole matter the said summe of twenty thousand pounds be Assets, then they find soz the Plaintiff, but if not, then soz the Defendant. And it was moved by Hammon Herjeant, that here is Assets upon this matter, and that by the Common Law, for it appeareth upon the Will, that the Lands were devised to the Lady, to the intent that she shoud pay his Debts. And although the words of the Charge are, that the Testator requests the Lady to pay his Debts, the same in a Will doth amount to a Condition, and so the meaning of the Devisor appeareth to be, that the mony

ney which is levied by such sale shall be Assets, &c. 2 H. 4. 21, 22. A man Assets makes a Feoffment in Fee to divers persons, upon condition that they sell the Land, and the money thereof coming distribute for his Soul. The Feofor dieth, the Feoffees (who were also Executors of the Feoffor) sell the Lands, the money thereof coming is adjudged Assets. And see, 3 H. 6. 3. And although it be not Assets by the Common Law, yet it is Assets by the speciall Statute, which ordaines, that he shall be charged with the Debts, and that the Lands shall be sold. And it was found by the Verdict that such Lands were sold, and such money levied upon the sale, which are administered. And although the said twenty thousand pounds were never the Goods of the Testator, yet as the Case is, 3 H. 6. 3. If Executors recover Damages in trespass of Goods taken away in the life of the Testator, such Damages so recovered are Assets. So if Executors redeem a Pledge with their own proper Goods, the same is Assets in their hands, by Kingmill, Vavasour, and Fisher, 20 H. 7. 42. And where the Executors took of one who was indebted to their Testator in a simple Contract, the same is Assets, 31 E. 3. And see many Cases of such speciall Assets, 7 Eliz. in Plowdens Comment. in Chapman and Dalton's case, 292. It hath been objected, that the speciall Assets enacted by Parliament, do not maintain the generall Assets intended in the Issue, but he conceiveth, the same is well enough. As 27 H. 8. 21. In an Action upon the Statute of 21 H. 8. for that the Defendant hath occupied Land to farm against the Statute. The Defendant pleaded, Non tenuit ad firmam contra formam Statuti: And gave in Evidence, that he had taken to Farm for the maintenance of his house, the same is a good Evidence, and shall maintain the Issue, for he did not occupy against the form of the Statute: for there is a clause in the Statute to that purpose. Puckering herjeant to the contrary, That it cannot be said Assets by the Statute, and that the Plaintiff upon this generall Issue shall not take advantage of the speciall Assets enacted by Parliament: And here the Plaintiff hath not pursued the Statute, for in case the Defendant will not confess the Debt, by the Statute the Commissioners ought to determine of it, and assess Damages for the forbearing, and then the party is to have her remedy for all as shall be so determined by the Commissioners by action of Debt: and because the Plaintiff hath not followed the said Statute, those twenty thousand pounds shall not be Assets as to her, for they are not agreed of the Debt, nor of the Damages for it, but the Commissioners are to appoint sale of the Lands, so as the money arising of the sale of any Lands, shall not be Assets but of such Lands which have been appointed to be sold by the order of the Commissioners. And as to the Common Law, the same is not Assets, but where Lands devised to be sold by the Executors for the payment of Debts and Legacies, in such case the money arising of such sale is Assets. And see 9 Eliz. 264. Dyer, A man devised his Lands to be sold by his Executors, and that the money thereof coming shall be disposed in payment of Legacies expressed in his Will, the Land is sold; by Catlin, Dyer and Sanders, the money thereof coming is Assets: but 4, & 5 Phil. & Mar. Dyer 152. the Law was otherwise taken. Where a man devised that his Executors should sell his Land, and that his Daughters should have such portions out of the monies thereof coming, the Land is sold accordingly, the Daughters sued the Executors in the Spirituall Court. In that Case a Prohibition lyeth, for it is not a Legacy Testamentary, but out of the Land, &c. And also in the principall case, the Lands are not devised to be sold, but there is only a Request to his Wife, that she would pay his Debts, without any condition, or expresse direction, or limitation, 30 H. 8. Land devised to Executors to sell, and the money thereof coming to be divided between his children: the money shall not be Assets, and if it be not Assets by the common Law, but speciall Assets by a speciall Law, the Plaintiff ought to have shewed the same in his Declaration, and then to have maintained against the Defendant

endant the said speciall Assets upon the Statute : As is in Debt upon an Obligation, the Defendant will plead, Non est factum, and give in Evidence the Statute of 23 H. 6. the same shall not maintain his Plea of Non est factum, but he ought to have pleaded the speciall matter in Bar. And see 4 H. 7. 8. So the Plaintiff here ought to have in her Replication Mewen the especiall matter upon the Statute. Anderson and Walmylly conceived, that the same is Assets within the Issue, and that the Defendant is chargable as Executrix, otherwise there is no remedy, and the Act confrmes her to be Executrix, and ordaines, that she shall take upon her the charge of payment of Debts, and that the Goods and all the monies which come by sale of the Lands and Woods shall be Assets. And because that by the said Act the money coming by sale of Woods and Lands are joyned together with the Goods of the Testator in the same plignt, all are in the same degree, and both equally Assets. Periam did not speak to that, but Windham held, That these Assets found by the Verdict, are not Assets intended in the Will, and that the plaintiff hath not pursued the Statute, which makes such matter Assets. It was adjoined.

Pasch: 33 Eliz: in the Common Pleas.

CCCVII. The Queen and the Bishop of York Case.

Quare Impedit.

Collation
gaines not the
Patronage of
the King.

The Queen brought a Quare Impedit against the Bishop of York, and one Monck; and counted upon a Presentment made by him, Hen. 8. in the right of his Dutchy of Lancaster, and so conveyed the same to the Queen by dissent: The Bishop pleaded, that he and his Predecessors have collated to the said Church, &c. and Monck pleaded the same plea, upon which there was a Demurcer. And it was moved by Beaumont Serjeant, That the plea is not good, for a Collation cannot gain any Patronage, and cannot be an Injunction against a common person, much lesse against the Queen, to whom no Lapses shall be ascribed: and although the Queen is seised of this Abbouson in the right of her Dutchy, yet when the Church becomes void, the Right to present vests in the roiall person of the Queen: and yet see the old Register 31. Quando Rex præsentat non in jure Coronæ tunc incurrit ei tempus. Hammon Serjeant, By these Collations the Queen shall be put out of possession, and put to her Wit of Right of Abbouson; but the same ought to be intended not where the Bishop Collates as Ordinary, but where he collates as Patron, claiming the Patronage to himself, for such a Collation doth amount to a Presentation; and here are two or three Collations pleaded, which shoulde put the Queen out of possession, although she shall not be bound by the first during the life of the first Incumbent. vide Sc. Quare Impedit 31. upon the abridging of the case of 47 E. 3. 4. That two Presentments the one after the other shall put the King out of possession, and put him to his Wit of Right of Abbouson, which Anderson denies. And it was holden by the whole Court, Here is not any Presentation, and then no possession gained by the Collations: and although the Bishop doth collate as Patron, and not as Ordinary, yet it is but a Collation. And there is a great difference betwixt Collation and Presentation, for Collation is a giving of the Church to the Parson, and Presentation is a giving and offering of the Parson to the Church, and that makes a Plenarty, but not a collation. And although that the Queen hath the abbouson, by the right of her Dutchy, yet that makes not any matter, for the person of the Queen privileged all her Capacities: and therefore Plenarty is no plea against the Queen, be she seised of the Abbouson in the Right of her Crown, or of her Dutchy; but when she claimes by Lapses, it is otherwise. And afterwards Exception was

Plenarty no
plea against
the King.

was taken to the Willit, because it is not set forth in the Willit how the Queen claimed the Abbots; as where the King had Right to present by reason of the Tempozalties of the Bishop in his hands, the Willit shall say, Ratione Archiepiscopatus Cant. nunc Vacane. or Ratione Custodiz: And so because this Abbots is parcell of her Dutchy, the Willit ought to say so: And Anderson chief Justice was of opinion, that the Willit was good enough, notwithstanding the want of that clause, Ratione Ducatus, for both waies it is good and sufficient, generally, or specially; as where a man hath an Abbott in the Right of his wife, and the Husband bringeth a Quare Impedit, the Willit shall be general, ad suam special. Donationem, without the mentioning of his wife. See the Book of Entries 483. the Willit is general, but the Count is special. And there is the very case of the Dutchy of Lancaster, and then the Willit is general, but the Count is ratione Ducatus sui Lancast. And such an avoidance of a Church, parcell of the Dutchy, may be granted under the Great Seal: And see the case of the Dutchy of Lancaster in Plowden to that purpose, and afterwards a President was shewed, in An. 32 H. 6. Where the Willit was general, and the Count was Ratione Ducatus.

CCCVIII. Pasch. 33 Eliz. in the Common Pleas.

A man made a Lease for years to begin at the Feast of our Lady Mary, for one and twenty years, without shewing the certainty at which feasts the Annunciation, Purification. &c. yet the Lease is good enough, and the Lessee may determine the certainty of the beginning of the Term by his Entry, at which of the said feasts the said Term shall begin, by Anderson chief Justice, but Periam doubted of it.

Pasch. 33 Eliz. in the Common Pleas.

CCCIX. Blagrave and Woods Cafe.

In an action of Trespass brought by Blagrave against Wood, of Lands in Totting in the County of Surrey, concerning a Surrender made to the Steward of Sir Thomas Holcroft, by Alice Pagnam, 7 E. 6. before one Forcer then Steward there: The Issue was, If at the time of the said surrender, the said Forcer was Steward of the said Mannor. And the Jury found a speciall Verdict, scil. That the said Forcer circa 9 Aprilis, 7 E. 6. was retained by one Elizabeth Pagnam, then, before and afterwards Lady of the said Mannor, to be her Steward there for the keeping of the Courts of the said Mannor, and this Retayner was only by Wood in the Countrey, and no fee or Annuity given for the exercise of the said Office: and that the said Forcer, according to the said Retayner, had kept Courts there divers times. And further, that such a day and yeare at so. Dunstons in the East, the said Forcer took a Surrender, which was entred in the Rolls the next Court: and that before that and after, he took divers Surrenders as well out of Court, as in Court, and ha holden divers Courts there. And upon this Verdict, it was moved by Snagg Serjeant, That Forcer upon the matter found by the Verdict, is not such a Steward, that may take Surrenders out of Court, being retained only by Wood, althoough to do other Acts in Court he be a sufficient Steward, for in the Court he is as a Judge, and no body is to dispute his Authority thers. And there is a great difference betwixt a Steward of a Mannor, and a Steward of Courts; and a Steward of one Mannor hath not as great an authority as the Steward of another Mannor, for a Steward of a Mannor may take Surrenders in any place, otherwise it is where a Steward is retained to keep

Vide C. 4. part. 3o Dame Hol-
mest case. Courts, for he hath no authority but to keep Court, and all his power is with,
in the Court, and not without. See 8 Eliz. Dyer 248. Drew her intent to the
contrary, Here Forcer upon this Retaynder was Steward at the Court of
the Lady of the Manor, to which still shall not be said to be determined, untill
the Lady doth discharge him: and the difference which hath been taken be-
twixt Steward of Courts, and Steward of a Manor is nothing to the pur-
pose, for there is not any reason in it: and it is true, an Assise cannot be
brought of such an Office, without a Patent of it, for it cannot passe for life
without a Deed, and although a Steward in the Courts of Coptholders be
a Judge, yet he may be appointed without Deed: as where two submit them-
selves to the arbitration of others, now the Arbitrators are Judges as to that
intent, and yet they may be appointed Arbitrators, and discharged without
Deed, 19 H. 6. 6. 5 E. 4. 3. 21 H. 6. 30. but they cannot by their award trans-
fer Free-hold from one to another, 21 E. 3. 26. 14 H. 4. 18. and 17. by Calpe-
per and Skreen; and see as to a Steward retained by Warr, 8 Eliz. 148, and
see 12 H. 7. 25, 26, 27. where a Bayliff of a Manor may be appointed without
Deed, so of an under-Sheriff, and yet he is a Judge. Owen Herjeans con-
trary, Here Forcer at the time of this Surrender was not Steward, but the
Retaynder void. 1. No Fee is allowed unto him for the exercise of the said
Office, 3 H. 6. A Labourer may be retained without promise of any Sal-
ary in certain, for it is appointed by the Law. 2. He is not retained by
Deed, and although he may be retained without Deed to hold Court, pro hoc
vice, yet if the Retainer be for life, or for yeares, it ought to be by Deed. 3.
He was retained to keep the Court, but not to be Steward, which shall be in-
ferred to hold Court, and then when that is past, his authority shall cease, and
then all which he doth afterwards is void. But if he had been retained to be
Steward of the Manor, then the Surrender taken out of Court had been
well enough. 4. There is not any custome found by the Verdit, to warrant
such a Surrender taken out of Court, and then if the Surrender be not war-
ranted by their custome it is void. Yelverton to the contrary, In all cases
and reall actions which concern Lands, the Suitors are the Judges, but in
personall actions under the summe of forty shillings the Steward is Judge:
and although he be a Judge, yet he may be appointed without Deed. And
whereas it hath been objected, that no Fee is appointed for the exercising of
the Office, the same is not materiall as to the Grant, but the party is not
compellable without a Fee to do the Service: and a man may be constitu-
ted Bayliff of such a Manor without Deed, and yet more doth appertaine
to the Office of the Bayliff, then to the Steward: as if the Lord of a Man-
or be beyond the Sea, the Writ of Right shall be directed to the Bayliff
of the Manor: and see 21 H. 7. 36, 37. Where the Sheriff, or Steward of a
Manor may be without Deed: and here in the principall case, the Retay-
ner is not to keep one Court, but to keep the Courts of the Lady of the
Manor, scil. all her Courts, untill he be discharged. It was aduertised.

Pasc. 33. Eliz. In the common Pleas.

CCCX. Ascew and Fuliambs Case.

Audita Quere-
la.

AScew was bounden by Statute to Fuliamb, and there was not then Seals
put to the Statute, and Execution was sued upon the said Statute, the
Convisor brought an Audita Querela, and they were at Issue, if two Seals
were to the said Statute, and tryed for the Plaintiff in an Audita Querela by
the Sheriff of the city of Lincoln; And it was moved by Glanvill Herjeant,
that the Issue ought to have been tryed by the certificate of the Mayor of Lin-
coln

one, before whom the acknowledgement was, and not by Jury, which was denied, for the Issue is not whether any such Statute was acknowledged or not, but whether the Statute in question hath two Seals or not, and that is not recorded by the Mayor, as the Statute it selfe is: Another Exception was taken, It appeareth by the Marget of the Record, that the Issue was tryed by the County of Lincolne, where it ought to be tryed by the County of the City of Lincolne, for Lincolne only is in the Marget, But to that it was said, that such is the usual forme, to which the Preignothorizes agreed, and the Book of 18 E. 3. 25. was urged, where execution of Lands of the Comptoz was awarded upon a Statute Merchant, and the Statute was to pay, &c. 16 E. 3. But the Originall Writ which issued to take the body of the Comptoz was 14 E. 3. And upon that Error brought: And the Court allowed that case, but these two cases do differ, for there the Processe was misawardes, not so here: And although a writ of Error may lye, yet the same both not prove, but that an Audita Querela may lye also: And afterwards Judgement was given for the Plaintiff.

Pasch. 31. Eiz. In the Common Pleas.

CCCXI. Jennings and Gowers Case.

In the Case betwixt Jennings and Gower, the words were; That if the wife of the Devisor would permit one Wats to enjoy such a Term for the Term of three years next following, that then she should have all the residue of his Goods and Chattells as his sole Executrix, &c. Anderson the Justice conceived, That shee shold not be Executrix, For she is to be Executrix, upon a condition precedent to be performed before that shee be Executrix: And the condition is impossible to be performed, and then shee shall never be Executrix, for where an estate is to be created upon a condition impossible to be performed, there the estate shall never come in esse, and here the condition is impossible, for how can shee suffer Wats to enjoy the Term for three years, next following, & the 3. years ought to be past before shee hath any power, either to permit or resist, for until the three years be encurred, shee cannot be Executrix, nor before the three years expired can they bring any action as Executrix, for her authority doth not begin before the three years be expired. Walm. Peri. & Wind. contrary; Although a grant upon a condition precedent doth not take effect untill the condition be performed, yet such a construction ought not to be used in this case, so the intent of the Devisor in this case shall stand: If the condition had been, that if the wife will finde meat and drinke to lode a person untill his death, That then shee shall be Executrix, shall not the wife be Executrix till after the death of such party? truly yes, for otherwise shee shold never be Executrix, which is utterly against the meaning of the Testator, for it was not his intent that the Ordinary shold commit Administration of his goods in the mean time: And afterwards Anderson changed his opinion, and agreed with the other Justices: Periam, The subsequent words prove directly, that the meaning of the Testator was, to make his wife Executrix immediatly, untill shee were disturbed by the said Wats, for the words are, that if he refuse to suffer the said Wats to enjoy &c. Then his Son shall be his Executrix, which words imply, that by a disturbance made by the wife her Executrix shippe shold cease, and that the Son shold have it, which cannot properly be if shee was not Executrix from the begining. And it is the usual course in the construction of Wills, to consider all the clauses of the Will, and to adjudge upon all the words of the Will, and not upon one part only, and such construction the Judges used in the cases of Param, and Yardley, and Welden, and Elbing. And afterwards at another

another day Judgment was given for the Wiffe; That shee was Executrix presently, and her authority shold not expec till the three years were expiered, if not that any actual disturbance can be proved to be or have been made by the Wiffe against the Will of the Devisor, and the words of the Will, will receive such construction, that shee shall be Executrix till an actuall disturbance of Wats.

Pasc. 33. Eliz. in the Common Pleas.

CCCXII. Palmes and the Bishop of Peterboroughs Case.

Quare Impedit.

Refusal of the Bishop.

In a Quare Impedit by Margaret Palmes against the Bishop of Peterborough, who pleaded, That the Plaintiff did present unto him one I S., of whom the Bishop asked if he were within Orders, & if he had his Letters of orders, & because the Presentee could not shew the Bishop his Orders, he refused him; And commanded him to come another time and shew to him his Orders, and that the Presentee did never do it, nor offered to the said Bishop his said Orders, without that he did disturb him in other manner. And by Periam and Anderson it is no Plea, for upon his own shewing the Defendant is a disturber; For although that the Statute of 13 Eliz. requires that no man shall be admitted to a Benefice with cure of souls, if he be not a Deacon, yet the Statute doth not extend to compell the Clark to shew his Orders, and therefore when he for such a frivolous cause doth refuse to admit him, the same is a disturbance; And afterwards exception was taken to the Court, because that the Plaintiff being Tenant for life of the Abbowm of the gift of her Husband, had not alledged any Presentment in her Husband, or any of his Ancestors, but only in her selfe, But that was not allowed, for that point hath been lately overruled in this Court, in the case betwixt Specot and the Bishop of Exeter, & 8 H. 5. 4 adjudged accordingly, vi. 9 H. 7. 23. And the clear opinion of the court was, that the court was bound notwithstanding that exception: As to the matter of the Plea the court doubted of it, for the plea was, that the Bishop demanded, of the Clark presented, his Letters of Orders, & Letters Testimoniall, of his good behaviour, and his Letters Pissive, and he did not shew them but requested of the Bishop the space of a week, to satisfie the Bishop in those points, which was allowed unto him, but he never returned, for which cause the Bishop afterwards refused, &c. And it was said upon that Plea, That the clarke who is presented, ought to make proof to the Bishop that he is a Deacon, and that he hath Orders; otherwise by the Statute of 13 Eliz. the Bishop is not bound to admit such Clarke, but the Statute doth not compell the Clark to shew his Orders, for perhaps he hath lost them, but how his Orders shold be proved, it was much doubted: Anderson, Who Bishop may examine him upon oath, if he hath Orders or not; But as to the Letters Testimoniall of his good behaviour and sufficiency, the Bishop ought to examine the same himselfe, and if he give day and defer the Admission because he is not resolved therein, he is a Disturber if the Clarke come to him in a convenient time: And the Bishop cannot refuse a Clarke for the want of Letters Testimoniall.

Pasc. 33. Eliz. in the Common Pleas.

CCCXIII. Linacers Case.

In an Audita Querela brought by Linacer, It was said by Anderson cheife Justice, That if a man be in execution by his body and Lands upon a Statute;

tute; If the Sheriff permit the Consulz to goe at Liberty, yet the Execution of the Land is not discharged; But if he goe at large by the consent of the Committee, then the whole Execution is discharged: And the Consulz shall have his Land againe presently.

Pasch. 33 Eliz. In the Common Pleas.

CCCXIV. Brownsall and Tylers Case.

The Case was, that Tenant in tail brought a Writ of Entry, Sur disseisin and the Writ was generall, and it was moved, if the Writ was good and 21 H. 6. 26. was vouch'd, where it is holden, that the Writ ought to be speciall, scil. to make mention of the tail: But it was holden by the Court, that the generall Writ is good enough. And then the count ought to be speciall, vi. Fitz. 191.

Trinit. 30 Eliz. In the Kings Bench.

CCCXV. Ward and Knights Case.

In an Action upon the case, the Plaintiff declared, That whereas Lostock Parcell of the Maner of E in the County of Suffolk is an ancient Towne, and ancient Demesne of the Crowne of England, and that, time out of minde, &c. all the men, and Tenants of ancient Demesne ought to be quitted of Toll in all places within the Realme, for them, their Goods and Chattells, &c. And whereas the Queen by her Letters Patents the tenth of September, the nineteenth of her Reign, commanded all Mayors, Bailliffs, Constables, &c. to permit and suffer the men and Tenants of ancient Demesne, to be quit of Toll, Purage, and other exactions shroughout the whole Realme; And whereas the Plaintiff was an Inhabitant, and Tenant in Lostock aforesaid, and such a day and year carried his Goods to Yarmouth in the said County, the Defendant not ignorant thereof, had taken and carried away a Cable of the Plaintiffs goods, of the value of eight pounds for Toll, to his damage, &c. The Defendant pleaded by Protestation, that Lostock was not ancient Demesne, and by Protestation that the Tenants of ancient Demesne ought not to be quit of Toll, he said, That the Towne of Yarmouth is an ancient Borough, and that they had been incorporated by the name of Bailliff and Burgesses, &c. And that they have had, time out of minde, &c. an Officer called a Water-Bayly, and that, time out of minde, &c. they and their Predecessors have had and taken Toll of the Tenants and Inhabitants of Lostock, for any of their goods brought thither to Merchandise with, and if it be not paid, they have used time out of minde, to distraine suit by their Water-Bayly: And said, that the Plaintiff such a day brought to the said Towne of Yarmouth, two thousand weight of Cable Ropes to sell, for which there was due for Toll six pence, for Purage six pence, for Thongage four pence, and the Defendant being Water-Bayly demanded of the Plaintiff the said summe which he refused to pay, for which he took the said Cable, nomine districcionis, for the said Thongage, &c. Golding for the Plaintiff, the Defendant hath not set forth in himself any authority to demake the duty: For he sheweth, that they have used to distraine by their Water Bayly, but not that they have used to demand it by him, and it may be, therer have severall Officers, one to demand it, and another to distraine for it: And alwayes when a man demands a thing against common Right, he it: n

Prescription.

to shew authority expresse in the whole : And as to the matter in Law, scil.
The Prescription to have Toll of the Tenants in ancient Demesne, it can,
not have a lawfull beginning: As 21 H. 7. 40. The Lord of a Manor
sayes, that he hath had a Pound within his Maner, time out of mind, &c.
And that he hath used to have of every one who breakes his Pound, three
pounds, the same is a void custome to bind a stranger, for it cannot have a
lawfull beginning, and see 5 H. 7. 9. b. One prescribed, that if any Cattell
be taken in such a place, Damage fealanc, that he might distraine them
and put them in Pound untill the Owner had made amends, at the will of
him who distrained them, the same is a void Prescription, for it cannot have
a lawfull beginning, and time cannot make such a thing to be good, The
King may grant Tollsage, Pontage, &c. but not to the prejudice of another,
as 22 E. 3. 58. The King cannot grant to one Thorough-toll to passe by High-
ways, for it is an oppresyon to the people, for every High-way shal be common
to every one, see 16. E. 3. Grants 53. and here the Tenants of ancient De-
mesne are quit of Toll by the common Law, and not by Prescription, which
see Fiz. 14. and such Tenants have an Inheritance in such Liberties, which
the King by his grant cannot take awa.y, & then if it cannot have a lawfull be-
gynning, it cannot be good by Prescription: also this Prescription is against
the Common-wealth, therefore it is a void Prescription, and the Common-
wealth is much respected in Law, and things which in themselves are justifi-
able by reason, are not justifiable if they be injurious to others, as 21 E. 4. &
8 E. 4. 18. Fishers may prescribe to wy their Nets upon the Lands of others,
and none can prescribe against such a Prescription, so here, all Lands which
are ancient Demesne, are holden in Socage, so as they were all Husband-
men, who manured their Lands for the sustentation of the Kings Subjects,
to which they had such priviledges to be the better able to follow their Hus-
bandry, and therefore to disable such profitable Subjects, and to prescribe a-
gainst these Liberties and Priviledges, is to take away the name of ancient
Demesne, and to make their Lands at the common Law. Hobart contrary:
So shew the authority to demand is not necessary, for our Prescription is not
upon demand to distraine: For the common Officer hath authority to de-
mand, for they ought to demand it, who ought to take the thing demanded,
and those are the Bayliffs and Burgesses, and then when their wafer-barely
doth it, it is as much as if it had been done by the corporation, which see 48 E.
3. 17. The Mayor and comminity of Lincolne, brought an action of covenant
against the Mayor and Comminality of Derby, and declared, that the Mayor
and comminality of Derby had covenanted with the Mayor and comminity of Lin.
that they shoulde be quit of Purage, Pontage, Custom & Toll within the
Towne of Derby, of all merchandises of those of the Towne of Lincolne; and
further declared, That I W and H M, two Burgesses of the Towne of Derby,
had taken certain Toll of certayne Burgesses of the Towne of Lincolne, &c.
Exception was taken to this Declaration, because they had alleadged the ta-
king of such Toll, not by the corporation of Derby, but by I and H. two of the
Burgesses of it, in which case the Plaintiffs might have an action of Trespass
against the Burgesses, for the act of any of the corporation is not the breaking
of the covenant, made by the comminality, but it was not allowed, for if the
common Officer of the Towne doth any thing for their common use, as it is
intended such thing was done by the Officer, it is reason all the Towne be
answerable for it, and the whole comminality by intendment cannot come at
one time to take, &c. and so in our case, for as much as the corporation ought
to make the demand, and their common Officer doth it to their use, the same
is the act of the whole corporation. As to the matter in Law, we have plea-
ded specially; That we took Toll only of those things which are brought by
Sea by Merchants, and not otherwise, and I conceive that Tenants in anti-

cient Demesne, are not discharged of Toll for all things, but only for such which arrie out of their Tenements, or are bought for their Tenements or Families there, and their sustentations, according to the quantity of their Tenements, 9 H. 6. 25. 19 H. 6. 66. They shall be quit of Toll, of all things sold and bought coming of their Lands, or for the manurance of their Lands: 2d 7 H. 4. 111. Tenants of ancient Demesne, ought to be quit of Toll for Dren or Beasts bought and sold for tillage, and manurance of their Lands, and for their sustenance and maintenance of their Families, and for putting them to Pasture to make them fat and more vendable, and so to sell them, &c. And see accordingly, F.N. B. 22 4. D. See Crook 138. 138. 28 Eliz. A Judgment was given for the said parties, for the Plaintiffs: but there the Plaintiff declared generally, and the Defendant did demur in Law generally, wherefore by common intendment, the Cattell were bought for the tillage and manurance of their Lands: For there it was not shewed (as it is here) that it was to Perchandise: Also we have justified, not only for Toll, but also for Trouage, and that they have not shewed, and therefore as to the Trouage our justification is good enough, for their privilege shall not be construed to extend beyond the words of it: As the privilege of the Law is, That if I leave my houle at Smiths Forze to be shod, there my Housle cannot be distrained, but if I or my Servant take the Hidle from the Housles back, and lay it in the Smiths Forze, the Hidle may be distrained. Then here are two customes meeting together, and to begin together, and the one was not before the other, then the particular custome shall stand: And I conceive that by the Will, de exoneracione sect. Fitz. N. B. 161. b. The Tenants in ancient Demesne, have not alio: yes such privileges, for the Will saith, quod si ita sit, then, &c. and nisi ipsi, & eorum antecessores tenentes de eodem manerio venire consueverunt temporibus retroactis, and see the same matter in the Register, 181. And afterwards, Judgment was given, quod querens nihil capiat per billam, for the Justices were of opinion, that the Tenants in ancient Demesne should pay Toll, for their Perchandises.

Mich. 32, & 33 Eliz. in the Kings Bench.

C CCXVI. Lancaster and Lucas Case.

The spasse was brought for entring into the Parsonage house of Ringhall, Leases, and divers Lands appertaining to it: The Defendant being farmed of the Parsonage, pleaded, Not guilty; and the Jury found, that one Tybin was Parson of the said Church, and that one Ash and Dorothy his Wife, Wivell and Drausfeild were Patrons of the said Church, scil. Ash and his Wife in the Right of his Wife, Wivell as Tenant by the Curtesie, the Reversion to his Son, and Drausfeild also as Tenant by the Curtesie, but without Issue by his Wife, &c. so as the Inheritance of the said Parsonage was in Wivell and Ash: and afterwards the Bishop of Chester being Ordinary, the Parson and Patrons, 4 E. 6. joyned in a Lease of the Rectory (which Lease was boyd as to the Wife of Ash) to S. who assigned it to the Defendant. All the Lessors dyed: and further found, that Ash and Wivell were Heires of the Patronage, and that the Church being boyd, the Presentment came to the Bishop by reason of Laple, and that the Successor of the Bishop had Collated his Clark. Cook argued, And he conceived that the same

Attornement.

now Incumbent should avoid the Lease in toto; and the case is but this: Three Coparceners Patrons of an Abbowlion, or Tenants in Common, the Parson, three Patrons, and the Ordinary joyn in a Lease (where the one of them is a Feme-covert; and so her Act void) If the Successor of the Incumbent being presented by Lapses shall avoid it in all: and he conceiveth that he shalld, for all three have interest in the Parsonage, and all three ought to agree, but the agreement of the one is worth nothing: But it hath been said, that that is but matter of assent, and that the assent of the one is as strong as the assent of them all; As if many Joyn-tenants hold by certain Services, and the Lord granteth the Services to a stranger, and one of the Joyn-tenants attorneth to the Grant, the same is as sufficient as if they had all attorned, Lit. 128. 566. Otherwise it is of a Rent-charge, for there all the Joyn-tenants of the Lands charged upon the grant of the said Rent ought to attorn to the Grant; for the Tenant ought to attorn, and one of them is not Tenant: And in case of a Rent-charge, the Abowry is upon the Lands: but Attornement differs from our case, for Attornement is but a bare assent, without any interest in him who attorneth, for an Abator may do it, but here is matter of Interest, and in Attornement, Attornement for one acre is effectuall for all, 18 E.3. Fitz. variance 63. but otherwise it is in case of Confirmation for one acre, the same doth not extend to the rest, for in such case an Interest passeth. So here, the one of them is not Patron, therefore all of them ought to concur, 31 E.3. Grants 61. That such act of the Patron shall not bind but according to the Estate of the Patron, which see Lit. 112. 528. as if Tenant in tail confirm, the same shal not bind the Presentee of the issue, See Fitz. Grants 104. In c. R. 2. The case was that the Bishop of Covent, and Lichfeld has two Chapters, one of Coventry, the second of Lichfeld, and he made a Conveyance, but one Chapter only did confirme it, the same doth not bind the Successor, for both are but one Chapter in respect of the Bishop, and see the case abridged by Scatham to Aelite, for the Bishop is chosen by both Chapters, there a confirmation must be of them both: The case in Dyer 11 Eliz. 282. Thark, Bishop of Dublin, hath two Deanes and Chapters, the one surrendezeth without the assent of the Bishop, and afterwards the other Dean and Chapter confirmeth a Lease made by the Bishop, the same is good: I confess that, for the Surrender was by Act of Parliament, and so one sole Chapter remained: And in our case, the Lease cannot be good in part, and void for the residue, for all are but one Patron, as 22 H.6. 47. Two Coparceners are, they make composition to present by Turnes, a Writ of Annuity is brought against the Incumbent, he shall have aid of both, and see the Case betwixt Gore and Dawbney in the Exchequer Chamber upon a Writ of Error, where two are accountable, an Account made by the one is not good, for both the Accountants shall make but one account, and therefore the Account of the one cannot be good: And the Lord Anderson putt this Case, two Joyn-tenants of a Mannor, the one of them doth grant a Copy, the same is void, for he is not Dominus pro tempore: And see as to the assent of them all, &c. 3 Eliz. 190. Dyer. But it hath been objected, That now the Incumbent comes in by the Ordinary, and not by the Presentment of the Patron, and the Ordinary is bound by the confirmation of his Predecessor, as to that the collation of the Bishop by Lapses, is in the right and free of the Patron, and as the Presentee of the Heire of the Patron shall avoid, &c. so also of the Ordinary: and 20 E.3. Bar. Presentment 12. The Patron shall have a Writ of Darrein-presentment upon the present. of the Bishop for Lapses, and 22 H.6. If a man recover an Abbowlion, and after the Bishop collate for Lapses, the same is an Execution of the Judgment, & wil make a possellio fratri, as Moyle saith, And in our case this

this Confirmation is void in all, because Non sunt concurrentes ii qui in hac parte concurrent debuerant: And it is an entire Act, and cannot be aboyded in part, and stand for the residue, and the Presentee comes in in the right of the Heire for which he shall abyde it, &c. Popham contrary, It is to be here considered, if the Ordinary hath Interest in the Church by this Lapse, or only an authority, for if he hath an Interest, then it will follow, that every one of his Successors shall be bound by his Confirmation, and also their Presentees: It hath been objected, that there ought to be a full and entire Patron who makes such a Lease, otherwise it is void: But that is not so, as if the Patron be Tenant for life, his Lease or Confirmation shall not be void in all, but shall be good during his life, which see 31 E. 3. Grants 61. and 19 Eliz. 356. A Patron makes a Lease for forty yeares, the Bishop being Patron and Ordinary confirmes it, the Patron dyeth, the Bishop presents, and afterwards is translated, this Lease shall stand during the life of the Bishop, and of the new Incumbent who sound the Church charged, and then such Lease may be good for part, and void for part, see for the same, 2 E. 3. 8. If the Abbowson of a Church be appropiated unto a Prior and his Successors, if afterwards the wife of the Ouantz be endowed of it, and present her Clerk, the Church is become dis-appropiated during the life of the wife, but afterwards shall stand, vi. the case cited to the contrary, 29 Eliz. in the case of the Earle of Bedford, c. 7. part 8. At the beginning the Patron was not restrained to any time to present his Clerke, but the six months was appointed at the instance and suit of the Ordinaries by a Canon, confirmed in the councell of Lateran, before which time, the Ordinaries had not any Lapses, but after the said Canon, they had an Interest in the Church, and this appeareth in the Register: And see F.N.B. 37. f. that after the Ordinary is entituled to Lapses, The Plaintiff in a Quare Impedit cannot have a Ne admittas, for now the Ordinary hath an Interest: And if the Bishop hath Title to present by Lapse, and before Presentment he dyeth, so as his temporalties comes to the King, the King shall present, which proves that it is an Interest, and the Civilians call it Interest, caducum & condicionale: And in our case the confirmation of one Coparcener shall binde the other Coparceners, in Natio habendo, shall binde them all, and the villaine shall be free for ever. And it was moved, also that if an usurper, or the Clerk who is in by him shall avoid this clause, and by the words of the Statute of West. 2. Si tempus semestre transierit per impedimentum alicujus, ita quod Episcopus Ecclesiam conferat, & verus Patronus ea vice presentationem suam amittat, adjudicentur damna ad valorem Ecclesie pro duobus annis; Therefore what the Patron loseth, the Ordinary hath the same, therefore it is an Interest, and in lieu of that losse the Statute gides damages to the Patron, &c. And the Case was adjourned to be further argued at another day, &c.

March. 33. Eliz. Rot. 392. In the Kings Bench.

CCCXVIII. Pet and Baldens Case.

In a prohibition the Plaintiff declared, that whereas Michael Pet was Seised of diverse Lands, and made his Will, by which he made the Plaintiff Prohibition, tift his Son his Executor, and thereby devised unto A his Wife one hundred pounds, in consideration and recompence of her Dower of all his Lands, & dy-

rd, and the said A took to Husband the Defendant: And that after betwixt the Plaintiff and Defendant, colloquium quiddam habebatur, &c. upon which conference and communication, the Defendant in consideration that the Plaintiff promised to pay to him the said one hundred pounds, promised to make to him a discharge of the said one hundred pounds, and also of the Dower of his Wife, and shewed further, that notwithstanding that the said Pett was ready, and offered the said one hundred pounds, and Dower also, yet, &c. Upon which there was a Demurrer in Law; It was moved by Tan, that here is not any cause to have a prohibition, for the agreement upon the communication is not any cause, for it doth not appear that it was performed. Coke, A prohibition lyeth, for the Wife cannot have both, money, and Dower, for that was not the meaning of the Devisay, and therefore it hath been holden, that if a man deviseth a Term to his Wife, in satisfaction and recompence of her Dower, if she recovereth Dower, he hath lost her Term; Also here is modus and conventio which alters the Law, scil. mutuall agreement: So if the Parson and one of the Parishioners agree betwixt them that for forty shillings per annum, he shall retaine his Lythes for three years, &c. as it was in the Case betwixt Green and Pendleton, &c. it is good.

Mich. 32. & 33. Eliz. In Banco Regis.

CCCXIX. Martingall and Andrewes Case.

Action upon
Becate for
1st oppin
Way.

In an Action upon the Case, the Plaintiff declared, that one Mildmay had leased of a House in A, and that he and all those whose estate, &c. time out of minde, &c. have had a way over certaine Lands of the Defendants called C. pro quibusdam avertis suis, and shewed, that the said Mildmay enfeoffed him of the said House, and that the Defendant stopt the said way, to his damage, &c. And it was found for the Plaintiff, and it was moved in Arrest of Judgment, that the title to the way is not certainly set forth, i. e. pro quibusdam avertis suis, quod omnes Iudicarii concederunt, But Gawdy Justice conceived, that the same was no cause to stay Judgment: For it appeareth to us, that the Plaintiff hath cause of Action, altho that the matter be incertainly allogaged, and of this incertainty the Defendant hath lost the advantage, having surceased his time by pleading to it, as 20. E. 3. Trespass for taking and carrying away of Charters, the Defendant pleaded Not guilty, and it was found for the Plaintiff to the damage, &c. And Errour was brought, because the Plaintiff had not set down in his Declaration, the certainty of the Lands comprised in the Charters: But non allocatur, for the Defendant ought to have challenged that before, and also 47. E. 3. 3. In a Writ of Covenant the Plaintiff declared of a Covenant, by which the Defendant covenanted with the Plaintiff to assure to him all his Lands and Tenements which he had in the Counties of Gloucester and Lincolne, and declared, that at a certayne day he required the Defendant to make him assurance of all the Lands, &c. And the Writ of Covenant was generall, quod tenet coventionem de omnibus terris quod habet in, &c. And it was objected (as here) that the Writ wanted certainty, as how many Acres, or such Manors, but non allocatur, for here the Plaintiff is not to recover Land, but only Damages, and the Writ was awarded good. Fenner Justice, the Cases are not like to the Case at War, for in the said Cases, the certainty is not needfull, but for the taking of the Damages; but here, the certainty of the number of the Cattell is part of the title.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXX. Beale and Taylors Case.

Upon Evidence to a Jury, It was holden by Gawdy and Clench Justis, that if a Leale for yeares be made, and the Lessor covenants to repair during the Termne, if now the Lessor will not doe it, the Lessee himself may doe it, and pay himself by way of Retainer of so much out of the Rent, which see 12 H. 8. i. 14 H. 4. 316. A Leale for yeares by Indenture, and the Lessor covenants to repair the Houses, and afterwards the Lessor commands the Lessee to mend the Houses with the Rent, who doth it accordingly, and expends the Rent in the charges, &c. So 11 R. 2. Bar. 242. The Lessor covenants, that the Lessee shall repaire the Tenements when they are ruinous, at the charge of the Lessor; In debt for the Rent, the Lessee pleaded that matter, and that according to the Covenant, he had repaired the Tenements being then ruinous with the Rent, and demanded Indgment, if action, &c. and good: Feoner Justice contrary, for each shall have action against the other, if there be not an expresse Covenant to do it. Quare, If the Lessor covenant to discharge the Land leased, and the Lessee of all Rents, Charges, issuing out of it, If a Rent charge be due, if the Lessee may pay it out of his own Rent to the Lessor, ad quod non fuit responsum.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXI. Offley and Saltingston, and Paynes Case.

Offley and Saltingston, late Sheriffs of London, brought an action upon the Case against Paid, because that he being in Execution under their custody for fifty three pounds, in which he was condemned at the Soul of one Spicer, made an escape, the debt not satisfied, by reason whereof they were compelled to pay the money; The Defendant confessed all the matter, but further pleaded, that after the Escape, Spicer had acknowledged satisfaction (being after the Escape) upon Record of the sum recovered, upon which there was a Demurrer: Owen Serjeant argned that the acknowledging of satisfaction, being after the Escape, was not any Plea, for when the Plaintiffs, Sheriffs, have paid the money recovered, there was no reason that Spicers acknowledging satisfaction should stop the Sheriffs of their Remedy against Payne: It was holden by the Justices, that the Plaintiffs in this Action ought to shew, that they had been impleaded by him who recovered, for they cannot have this Action before they are sued. For perhaps the Plaintiffs who recovered but be contented to hold themselves to the Defendant, and to be satisfied by him; It was laid by Glanvill Serjeant, that by the Escape the Debt was cast upon the Sheriffs, and the Defendant discharged: And that it was the Case of Sir Gervas Clyton, who being Sheriff suffered him who was in Execution, and in his custody to goe and see a Play, and the same was adjudged an Escape, and the party could not be in Execution againe: And then he said, that this acknowledgement of satisfaction could not be any Bar to the Plaintiffs: At another day the Case was moved againe. And then it was the clear opinion of the whole Court, that the Action was maintainable, although that the Plaintiff in the first Action had acknowledged satisfaction: And it hath been adjudged here in this Court, in the Case betwixt Hill and Hill, that notwithstanding such satisfaction, that the action lyeth. See F.N.B. 130. b. for the payment after doth not take away the Action, but mitigate the damages only, for the Act of a third person shall not take away an Action once vested.

Mich.

Mich. 32 & 33 Eliz. In the Kings Bench.

CCCXVII. Greenliff and Bakers Case.

Assumpt.

The plaintiff declared, that whereas he was bound to the defendant in an obligation of forty pounds for the payment of twenty pounds, the defendant the second of Nov. after, in consideration that the plaintiff at the request of the defendant had paid the said twenty pounds without suit at law, promised to deliver to the plaintiff before such a day, an obligation by which one A. was bounden to the defendant in forty pounds, with a letter of attorney to demand the same of the said A. and to sue for it in the name of the defendant which he had not done, and in that matter the plaintiff had judgment, and thereupon the defendant brought a writ of error; First here is not any consideration; for the payment of the money is no more then he ought to doe, and which he was compellable to doe, &c. Secondly, the same is no benefit to the plaintiff, but only a matter of charge, to sue the said bond against A. Thirdly upon the venire facias, the Sheriff returned but twenty three Jurors. As to the first Error it was the opinion of Gawy and Fenner Justices, that here is not any consideration, for the defendant hath not any benefit by it, and the plaintiff doth no more then he ought to doe, and the payment was in respect of the debt, and not of the defendants request. And by Gawy upon this promise, an action doth not ly, for the plaintiff is not to have any benefit by it, but travell Fenner contrary, and that the action lyeth for that; as to the third Error, the same is helped by the Statute of 32 H. 8. and the Statute of 18 Eliz. of imperfect and insufficient returne of any Sheriff: Fenner, Not only the returne is naught, but also the pannell is insufficient. And it was moved by Tansell, that it was adjudged in this Court, Pasch. 25 Eliz. Betwixt Cook and Hoer, that where A was bounden to B in forty pounds, B promised to A. that if A would pay the money without suit he would deliver him the said bond, by which he is bounden to the said B., and it was holden a good consideration, Quod suit concessum per totam curiam, but that is not like to the case at bar, and it was holden in the same Plea, That if the obligor pay the duty at the day and place, that if the obligee will not deliver the bond; Yet the obligor shall not have detinne for it.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXII. Guilfords Case.

*Indictment
upon the Sta-
ture of 13
Eliz.*

Gulford was indicted upon the Statute of 23. Eliz. cap. 1. for withdrawing divers persons, her Majesties Subjects from the Religion established in England to the Roman Religion; and to promise obedience to the Church of Rome, and for that he himselfe was withdrawn from the obedience of the Queen. Coke took exception to the Indictment, because that the Indictment was not found within the year after the offence committed. In the said Act, there is a proviso, That all offences against the Act, shall and may be enquired of within the year and day after the offence committed. Popham Attorney General, This case is not within that proviso, but doth depend upon other Statutes before viz. 1. 5. & 13 Eliz. touching the acknowledging of her Majesties Supreme Government in causes Ecclesiastical, or other matters touching the service of God, or coming to Church, or establishing of true Religion within this Realme, shall and may be enquired as well before the Justices of the Peace, as other Justices named in the said Statute.

tate, within one yeare and a day after such offence committed: And he said, these words in the Proviso reser only to such offences contained in the said Act, which toucheth the supremacy and causes Ecclesiasticall, &c. And such offences ought to be enquired within the yeare and day; But this Indictment here doth consist upon other matter, for withdrawinge himselfe from the obedience of the Queen, which is an offence out of the compass of the said Proviso, and therefore the enquirie of it not restrained unto any time, and the Statute of 13 Eliz. extends to Wills, Writings, Instruments, &c. and not to the words (withdrawing by words) which is supplied by 13 Eliz. (withdrawing by other meanes) and the restraint of Enquiry at the time, goes to the hearing of Masse, and saying of Masse, and not (repairing to the Church) but as to withdrawing, the same is at large, not restrained by that Statute: And he said, that this Indictment doth consist upon many offences, some, to offences within the Proviso, and as to those, the Indictment is void: Some to other offences, as Treason, the offence of withdrawing, the Enquiry of which is not restrained, and therefore this Indictment shall stand: Also it was the intent of this Statute, not to restrain this Court, but only the Justices of Peace, for they are specially named, Coke, and he conceived that this word, touching, &c. did not extend to any thing contained in the Statute of 23. Eliz., but only to offences within the Acts of 1. 5. & 13 Eliz. which were incertaine before, also this Proviso is in the Disjunctive, against this or against the Acts of 1. 5. or 13 Eliz. so as that which followes is to be applyed to the last Disjunctive, and not to the whole sentence, and alwayes when a thing is named certain, and after generall things, the words subsequent shall be referred to the generall words, and not to that which is certaine. Also, if (touching, &c.) doth refer to this Statute, the sentence would have begun with it, but here it begins with the Supremacy, of which nothing is spoken in this Statute, and therefore it ought to be referred to the Statute which begins with it, and that is 1. Eliz. and then it shall be preposterous to come after 23 Eliz. and these words (shall and may) ought to be so construed (shall) is restrictive of it selfe, and (may) shall be referred to that which was restrained before, as the proceedings upon the Statute of 1. Eliz. cap. 2: were restrained to the next Sheriffs, and he conceived, that this Court is as well restrained to Time as any other Court, for the words are, as well before Justices of the Peace, as before other Justices named in the said Statutes, and in the Statute of 5 Eliz. This Court is especially named: Wray, this Proviso begins with Justices of the Peace, therefore it doth not extend to offences which are Treason, and the meaning of this Statute of 23. Eliz. was to enlarge the Statutes of 1. & 5. Eliz. for where the offence against the Statutes before, was to be enquired at the next Sessions, and the other within six moneths, now by this Statute it may be enquired at any time within the yeare and day, but it doth not extend to restrain the proceedings against offences of Treason, for the words of the Statute are, That such offences shall be required before Justices of Peace within a year, &c. But in the next clause, that the Justices of Peace against all offences against this Act, but Treason by which it appeareth, that no offences are restrained to time, but those which Justices of the Peace have authority to heare, and determine, and that is not Treason: Gawdy to the same purpose: For all the Proviso is but one sentence, and there the whole shall be referred to spirituall offences, as the not coming to Church, &c.

Mich. 32. & 33. Eliz. In the Exchequer, Error.

CCCXXIII. Fillcocks and Holts Case.

For an Action by Fillcocks against Holt, Administrator of A. the Plaintiff declared, how that the Husband of the Defendant, who dyed intestate, was indebted to the Plaintiff in ten pounds by Bill, and that the Defendant would permit the Defendant to take Letters of Administration, and give to her further day for the payment of the said ten pounds, promised to pay the said ten pounds to the Plaintiff, at the day: And upon a writ of Error brought in the Exchequer, upon a Judgement in the Kings Bench, in that case, It was assigned for Error, that here is not any consideration, for by the Law shee is to have Administration, being wife of the Intestate, and as to the giving of further day for the payment of the ten pounds, the same will not make it good, for it doth not appear that shee was Administratrix at the time of the promise made, and then shee is not chargeable, and then, &c. And such was the opinion of the Court. And it was said by Periam Justice, and Manwood cheife Baron: That the Bishop might grant Letters of Administration, to whom he pleased, if he would forfeit the penalty limited by the Statute: Also it was said, where an Executor or Administratoz is charged upon his own promise, Judgement shall be given, de bonis proprijs, for his promise is his own Act.

Mich. 33. Eliz. In the Kings Bench.

CCCXXIV. Adams and Bafealds Case.

Action upon
 the Case.

An Action upon the Case was brought, and the Plaintiff declared, That where such a one, his Servant, departed his service without cause or licence, the Defendant knowing him to be his servant, did retain him in his Service, and so kept him. Tanfeild, The Action doth not lye, for if my Servant depart out of my service, and another doth retain him, an action doth not lye at the Common Law, if he doe not procure him to leave my service, and afterwards retain him, or immediately taketh him out of my service. And this Action is not grounded upon any Statute, See 1 H. 4. 176. 47 E. 3. 14. 9 E. 4. 32. Gawdy, The Action lyeth, for here is damage and wrong done to the Plaintiff. Fenner contrary, For the wrong is in the departure, and not in the Retainer, and upon the Statutes it is a good Plea to say for the Defendant, that the party was vagrant at the time of the Retainer, and the (sciens) doth not alter the matter.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXV. Nash and Mollins Case.

Prohibition.
 Tythes.

Nash and Usher sued a Prohibition against Mollins, for that the Defendant had libelled against them in the spirituall Court, for Tythes of Wood, growing in Barking Parke in Essex; The other did surmise that the Lands were parcell of the possessions of the Prior and Covent of Cree Church, and that the said Prior and his Successoress, time out of mind, &c. had held the said Lands discharged of Tythes, and held them so, at the time of the Dissolution, &c. and the other part traversed it, whereupon they were

at

at Issue, if the Prior, &c. held the Land discharged, tempore Dissolutionis, &c. And now on the part of the Plaintiff in the Prohibition, certain old persons were produced, who remembred the time of the Monasteries, and that they did not pay any Tythes then, or from thence: Exception was taken to the suggestion by Coke, That here is nothing else then a Prescription, de non decimando, for here is not set forth any discharge, as composition, unity of possession, privilege of order, as Templarii Hospitarii, &c. Fener Justice: Spirituall persons may prescribe in non Decimando, for it is not any prejudice to the Church: Wray, Although it is not set down the speciall manner of the discharge, yet it is well enough, for we ought to take it that it was by a lawfull meanes, as composition, &c. or otherwise: For the Statute is, That the King shall hold discharged as the Abbot, &c. and we ought to take it, that it was a lawfull discharge of Tythes, tempore dissolutionis: And afterwards the Jury found for the Plaintiffs in the Prohibition: But no Evidence was given to prove, that the Defendant did prosecute in the spirituall Court, contrary to the Prohibition.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXVI. Shelldons Case.

Shelldon, Talbot, and two other, four persons in all, were indicted upon the Statute of 23 Eliz. of Recusancy, the words of the Indictment were, Quod illi nec eorum uterque venerunt, to any Parish Church, &c. It was moved by Atkinson, That the Indictment is not good, for uterque doth refer unto one of them, and not where they are many, as here, and so is an insensible word, and so upon the matter there is no offence layed to their charge. And the Justices doubting of it, demanded the opinions of Grammarians, who delivered their opinions, that this word (uterque) doth aptly signifie one of them, and in such signification it is used by all Writers: Gawdy, I conceive, that the opinions of the Grammarians is not to be asked in this case; But I agree, that when an usuall word in our Law comes in question, for the true construction of it, then the opinion of Grammarians is necessary: But (uterque) is no unusuall word in our Law, but hath had a reasonable Exposition heretofore, which we ought to adhere unto, which see 28 H. 8. 19. Threes bound in an Obligation: Obligamus nos & utremque nostrum, and by the whole Court (ut erque) doth amount to quilibet: And see 16 Eliz. Dyer 337, 338. Three Joyn't-tenants in Fee, and by Indenture Tripartite each of them covenanteth and granteth to the others, & eorum utriusque, to make assurance, and there it was holden that the word (uterque) doth amount to quilibet: Wray, Admit it shall be so taken in a Bond, yet it shall not be so taken in an Indictment: As if a man make a Lease for years rendering Rent payable at the day of Saint Martin, although there be two dayes of Saint Martin in the yeare, yet the reservation is good, and the Rent shall be taken payable at the most usuall day of Saint Martin there in the Country: But in an Indictment if an offence be layd to be done on Saint Martins day, without shewing which in certain, it is not good: Fener. The word uterque is matter of surplusage, and therefore shall not hurt the Indictment.

Mich. 32. & 33. Eliz. In the Kings Bench.

CCCXXVII. Blunt and Whitacres Case.

A Writ of Error was brought upon a Judgement given in the common Pleas in a Replevin, where the Defendant did avow as Tenant of the Plaintiff of F in the County of Berks, to Saint Johns College in Oxford, and layed a Prescription there in him and his Farmers to distraine for all Amercements in the Court of the said Plaintiff, and shewed that the Plaintiff in the Replevin was presented by the Homage, for not repaying of a House being a customary Tenant of the said Plaintiff, according to a paine imposed upon him at a former Court for which he was amerced by the Steward to ten shillings, and was also presented for not ringing of his Swine, for which he was amerced thre shillings four pence, and for these Amercements he distrained : And upon Nihil dicit Judgement was given for the Plaintiff to have return, upon which a Writ of Error was brought : And Error assigned, in that there is not any Prescription layed in the Avowry, for the Lord to amerce the Tenants, and of common Right, he cannot do it, See 48 E. 3. And such Amercement is extortion, for the Lord cannot be his own Judge, and therefore he ought to enable himselfe to distract by Prescription ; Another Error, because the Fine is layed to be assed by the Steward, whereas by the Law it ought to be by the Suitors, for they are Judges, and not the Steward ; Another, because, that in the Avowry it is set down, quod presentacion fuit, that he had not repaired a certayne House, but he doth not say, in facto & categorice, &c. that he had not repaired, for that is matter traversable, 4. here is no offence, for a Copy-holder is not bound to repair by the common Law, if it be not by Prescription, for he cannot have House-hold upon the Land as a Tenant may if it be not allegded a custome : Fanner, The Steward may assesse Fines for a contempt, but not Amercements if not by Prescription. Gawdy, The Lord of a Mannor cannot assesse Amercements for a Trespass done to himselfe upon his own Lands, but otherwise it is of a common Trespass, or a Trespass done in the Land of another, but for the Distresse, he ought to prescribe, and the Judgement was reversed.

Page. 29 Eliz. Rot. 121. In the Kings Bench.

CCCXXVIII. Page and Fawcets Case.

Error was brought upon a Judgement given in Lynn, where by the Record appeareth, that they prescribe to hold Plea every Wednesday, and it appeared upon the said Record that the Court was holden, 16. Feb. 26. Eliz. which was dies Dominicus, & that was not assigned for Error in the Record, but after in Nibbus et erratum pleaded, it was assigned at the Bar : And Almanacks were shewed to the Court in proofe of it, and it was holden clearly to be Error, but the doubt was, if it should be tryed by Jury, or by the Almanacks, and it was said, that the Justices might judicially take notice of Almanacks, and be informed by them, and that was the Case of one Robert in the time of the Lord Carline, and by Coke, so was the Case betwixt Galery and Bunbury, and afterwards the Judgement was reversed.

Trin. 33 *Ez.* In the Kings Bench.

CCCXXIX. Geofries and Coites Case.

It was found by speciall Verdict, that one Avice Trivilian was Tenant for life, the remainder to her Son in tail, the Remainder over; Tenant for life, and he in the Remainder in tail, make a Lease for life, the Remainder for life rendyng Rent; Tenant for life dyeth, he in the Remainder dyeth, and his Son accepteth of the Rent of the Tenant for life in possession, who dyeth, The issue in tail entreteth, he in the Remainder for life entreteth, &c. And it was conceived that this acceptance of the Rent of the Lessee for life doth affirme also the Remainder : See Litt. Sect. 521. and such was the opinion of Gawdy and Fenner Justices.

Pasc. 33. Eliz. In the Kings Bench.

CCCXXX. The Lord Mordant and Vaux cast.

The Lord Mordant brought an Action of Trespass against George Vaux, and declared of a Trespass done in quodam loco, called N, parcell of the Manor of Hawarden: The Case was, William Lord Vaux was seised thereof, and thereof levied a fine to the use of the Lord Vaux, which now is, for life, and after his decease to the use of Ann and Muriel Daughters of the Lord Vaux and their Assignes, until Ambrose Vaux should returne from the parts beyond the Seas, and should come to the age of twenty one years, or die, if they should so long live; And after the returne of Ambrose from beyond the Seas, and the age of twenty one years, or death, whichever of the said dayes or times should first happen, to the use of the said Ambrose and the heires of his body begotten, with diverse Remainders over: Ambrose returned, and 31. Eliz. before he came of full age (for it is not pleaded that he was of full age) levied a fine to the use of George Vaux, the Defendant in taint, with diverse Remainders over: Afterwards the Lord Vaux being Tenant for life, enfeoffed the Lord Mordant in Fee, upon whom the said George Vaux entred for a sofeitnre, upon which Entry, the Lord Mord. brought the Action: Dux. argued for the Plaintiff Amb. Vaux had nothing in the Lands in question, untill his returne from beyond the Seas, and his full age, & the estate doth not begin untill both be past, and he said, that no use did rise to Ambrose untill the time incurred, for the time of the beginning is uncertain and upon a Contingent, as 13 Eliz. Dyer 301. 301. A makes feoffment in Fee to the use of himself for life, & after to the use of B. who he intendeth to marry until the issue which he shall beget on her shall be of the age of twenty one years, and after the issue shall come of such age, then unto the use of the said B, during her widow-hood, the Husband dyeth without issue, the wife entreteth, and her Entry holden lawfull. But Error was brought upon it; And also Calthrops case was cited to the same purpose, 16 Eliz. Dyer, 336. This estate limited to Ambrose doth refer to the estate limited to Muriell and Ann, and not to the time, for ever the first estate is to be respected, as 23. Eliz. Dyer, 371. He in the Remainder in Fee upon an estate for life, devileth it to his wife, yeilding and paying during her naturall life yearly twenty shillings; and dyeth, living Tenant for life, the Rent shall not begin untill the Remainder falleth: So as the generall words refer to the beginning of the estate, although the words imply that the Rent shall be paid presently: And see also such construction, 9 Eliz 261. A lease was made for thirty years, and four years after the lessor makes another Lease by these words, Nos dictis, for

annis finitis, dedisse & concessisse, &c. Habend. et tenend. a die confectionis praesentium, termino predicti. finit, usque terminum, &c. And although, prima facie, the beginning of this Term seems incertaine, yet the Justices did respect the former estate, and so the Lessor hath the Interest of the Term from the making of the Deed, but no estate untill the first Term expire: Then Ambrose before his age of twenty one years levying a Fine, the Fine shall not bind the Feoffee, for it enures only by way of conclusion, and so bings parties and privies, but not a Stranger: And the party needs not to pleah a gaunt this Fine, quod partes, to the Fine, nihil habuerunt, for that appeareth upon their own shewing: Wiat contrary; The Estate of Ambrose accrues and rises when any of the said times comes, first full age, returne, death, for the words are, And after the returne of Ambrose from beyond the Seas, and the age of twenty one years, or death, &c. This word (or) before (death) doth joyne all, and makes the sentence in the disjunctive, and he cited a case lately adjudged in the Common Pleas: A Lease was made to Trewpeny and his wife for one hundred years, if he and his wife, or any child or children bewtwin them begotten shold so long live, the wife dyed without issue, the Husband held the Land, &c. for the Disjunctive before (child) made the sentence Disjunctive. Gawdy Justice, That had been Law if no such word had been in the Case. And Wiat said, That although the returne be uncertain, yet it is certain enough that he shall come to the age of twenty one years, or age: And also this is by way of use, which needs not to depend upon any estate, and if the Remainder shall vest presently upon his returne, then it would be doubtfull, what remainder it is, if it be a Remainder depending upon the estate for the life of Ann and Muriell, or for years, i. e. untill Ambrose shall come of the age of twenty one years: But be it incertaine, yet the Fines good, for here is a Remainder in Ambrose, and both are but particular Estates, and there is not any doubt, but that one may convey by Fine, or Bar by Fines such Contingent uses, for which see the Statute of 32 H. 8. All Fines to be levied of any Lands intailed in any wise to him that leuyeth the Fine, or to any his Ancestors in possession, Reversion, &c. which word (use) giveth to contingent uses, for at the time of the making of that Statute, there was no other use. Fenner Justice remembred the Case adjudged, M. 30. 31. Eliz. betwixt Johnson and Bellamy, which ruled this Case: Gawdy Justice, here is a certainty upon which the Remainder doth depend, i. e. the death of Ambrose, but the Case had been the moze doubtfull, if no certainty at all had been in the Case: Atkinson contrary; Here the Lord Vaux is Tenant for life, the Remainder to George in tail, now when the Lord Vaux leuyeth a Fine, this is a forfeiture, and then the Entry of George is lawfull: It hath been objected on the other side, that his Remainder was future and contingent, and not vested, therfore nothing passed to George by Ambrose. The words are (quousque Ambrose shall returne.) This word (quousque) is a word of Limitation, and not of condition, and then the Remainder may well rise when the Limitation happeneth. It hath been said, that this Remainder is contingent, and then the Remainder which is to vest upon a contingency, cannot be granted or forfeited before that the contingent happeneth: And he cited the Case of 14 Eliz. 314. Dyer. A Fine is levied to A to the use of B for life, the Remainder to C in tail, the Remainder to B in Fee, Proviso, That if B shall have issue of his body, that then after such issue, & 500 l. paid to &c. within six moneths after the birth of such issue, the use of the said Lands, after the death of the said B, and the said six moneths expired, shal be to the said B and the heirs of his body: And it was holden, that before the said contingent happeneth, B had not any estate tail, for there it was incertain if the said contingent would happen, but in our case, the contingents or some of them will happen, or run out by effluxion of time, and that makes the Remainder certain in Ambrose: And

he also argued, that the Limitations are severall, by reason of the Disjunctive, and the last part of the sentence, and that the said sentence is in the Disjunctive appeareth by the subsequent words (which of the said dazes or times shall first happen). And then the return of Ambrose (soz that first happen) vestis the Remainder in him, and therefore the Plaintiff ought to be barred. Buckley contrary: The estate of the Daughters both depend upon a Copulative, i. e. the returne of Ambrose and his full age, and both is but one Limitation; it is clear, that the first Limitation is upon a contingent, and the Remainder cannot vest untill both are performed, and as to that which hath been said, that here is a certain Limitation, i. e. the returne of Ambrose, 13 Eliz. the Case was, Lands were given to Husband and Wife, the Remainder to such of them as should survive the other, for years, the Husband makes a Lease for years and dyeth, it was holden, that although the Limitation was upon a certaine estate, yet because it is not known in which of the parties the estate secondly limited shall begin, the Lease is void; So here it is not certainly appointed when the estate limited to Ambrose shall begin, upon the return, full age, or death of Ambrose, and he said, that here are but two times of Limitation, first returne and full age, second death, returne and full age determines the estate of the Daughters, and also the death, if it shall first happen, and if these three times shall be construed in the Disjunctive, the same would overthrow the estate of the Daughters, which is an estate for years determinable, upon the death of themselves or Ambrose, the last words of the Limitation doth not distinguish or disjoyne it, but respects the estate precedent. And by Clench Justice, If the use limited to Ambrose, shall depend only upon the Limitation of his death, the same shalbe void, so then he shoulde not be in esse to take, but the other Justices were of a contrary opinion, and that the use is good, 7 H. 4. Gawdy, Although that here be three things, yet but two times, for the words are not (D:) at such of the said dazes or times, as shall first happen, for that would alter the case: but here these words ought to be intended as if they were spoken before in the Limitation of the estate to the Daughters, and cannot divide the former Limitation: and he said, that is by reason, that the Limitation upon the death, which is certaine, it shall vest in Ambrose presently, then if after the other Limitation shall fall, then his Remainder which vested in him upon the said certaine Limitation should be devestis, and shoulde now accrue to him upon the other Limitation, which should be absurdus and inconvenient, &c. It was adjoined.

Trin. 32. Eliz. In the Kings

CCCXXXI. Thomas and Wards Case.

In Ejectione firmæ, by Thomas against Ward, upon a Lease made to him of the Mannor of Midleton Cheney by one Chambers, the Defendant plead, in that long time before the Lessor of the Plaintiff had any thing, the Bishop of Rochester was seised, and leased the same to the Defendant: the Plaintiff by Replication said, that the said Lease was upon condition, v. z. The Lessee by the Inventory of the said Lease, did covenant that he would not put out, or dislurbe any of the Tenants inhabiting within the said Mannor out of their Tenancies, doing their duties according to the custome of the said Mannor; and shewed, that the Defendant had put out one Ann Green a Tenant dwelling there upon a Tenement parcel of the said Mannor, late in the possession and occupation of the said Ann, and that the Bishop had re-entered for the condition so broken, and made a Lease to the Lessor of the Plaintiff, upon which Replication, the Defendant hath remurred in Law: Tanfield,

Tanfeild argued for the Defendant, that the Bishop had not cause to re-enter, for there is not any condition in the Case, but only a Covenant, for it comes in only on the part of the Lessee; and they are words of Covenant only, where as every condition ought to be the words of the Lessor, and the Bishop hath sufficient remedy by Action of Covenant: But if the words had been indifferent and absolute without depending on the Lessor or Lessee, then it had been otherwise, as 3 E. 6. Dyer, 65. Non licebit, to the Lessee, are, concedere, vel vendere statum vel terminum, without the Licence of the Lessor, under paine of forfeiture, the same is a good condition, but here it is merely a Covenant, and it cannot be both: Haughton. Although the words sound in Covenant, and be the words of the Lessee, yet the Lease being made by Indenture, the same is the Deed of both, and every word in it is spoken by both parties, and although that he may have an Action of Covenant, yet he cannot thereby overthrow the Lease, as by Entry, by condition broken, and yet by the words it seems the meaning of the Indenture was, that by the breach of this Covenant, the estate should be defeated, for so are the words, sub pena forisfactar. And here by way of Action he cannot have the benefit of the whole Covenant, and therefore he shall have it by way of condition: And see the Case betwixt Browning and Pekton, Plow. 132. If it happen the Rent to be behind, that then the Lessee Covenants, that although the Rent be not demanded, that the said Lease should be utterly extinct, void, and of no effect, and 24 Eliz. there was a case betwixt Hill and Lockham, where by the Indenture of Lease, the Lessor Covenanted to grind all his Corn at the Mill of the Lessor, and afterwards in the end of the said Indenture, the Lessee covenanted to performe all the Covenants, sub pena forisfactar, and by the opinion of the whole Court, the same was a condition: And see 21 H. 6. 51. where in an Obligation where A was bound to B, the condition is written in this manner, Prædict. B. vult & concedit, That if the said A doth stand to the Arbitrament of such a one that then, &c. the same is a good condition, although they are the words of the Obligee, and the Deed of the Obligoz, and so here is a good condition. And such was the opinion of Wray and Gaudy, and Fenner did not contradict it: Wherefore Tanfeild said, Admit here it is a condition, yet here is not any breach of it sufficiently set forth, for the breach is assigned because he had put out a woman, usam tenentem, & inhabitantem, out of certain Lands parcell of the said Mannor, late in the possession and occupation of the said woman, and that might be, that she was but Tenant at Will, and the Covenant doth refer only to Copy-holders: And it may be also, that she had dispossessed one of the Tenants of the Mannor, in which case, the putting out of such a Tenant being in by wrong, is no breach of the condition. Also it is not averred in facto, that Ann was Tenant of any part of the Mannor: Also the Replication is, That the said Defendant had ousted the said Ann, where she had done her duty, fecit debitum suum, before the Duster, and that might be, that she had done her duty once, but not after, and therefore he ought to have said, that she had done her duty always, before her putting out, and this word (only) being single, is too generall, for it may be understood of curtesie, where the words in the Indenture are (Doing their duty according to the custome of the Mannor.) And also it might be, that Ann Green was Tenant and Inhabitant, but was not put out of the Land which was parcell of the Mannor. And Wray said, that these Exceptions were incurable: And therefore Judgement was given against the Plaintiff.

Mich. 31, & 32 Eliz. Rot. 414. in the Kings Bench.

CCCXXXII. Harvy and Thomas Case.

The Case was, Husband and Wife seised of Lands in the Right of the Leases; the Husband alone makes a Lease by word for years: Afterwards the Husband and Wife levy a Fine, and after the Wife and Husband both dye: It was holden clearly by the whole Court, that the Conuse should attend the Lease.

Trin. 32. Eliz. Rot. 314. In the Kings Bench.

CCCXXXIII. Sly and Mordants Case.

In an Action upon the Case the Plaintiff declared, that whereas he was seised of certain Lands, the Defendant had stopped a Water-course, by which his Land was overflowed, and found for the Plaintiff. It was moved in arrest of Judgement, that it appeareth upon the Plaintiffs own shewing, that the Plaintiff hath the free-hold, and therefore he ought to have an Assize, but the same was not allowed, and therefore the Plaintiff had Judgement.

Trin. 33. Eliz. In the Kings Bench.

CCCXXXIV. Kensam and Redings Case.

The Case was, That the Queen by her Letters Patents granted the sale of the Mannor of Brokley lying in W, and all the Lands, Pastures, Woods, Under-woods, and Hereditaments, parcell or appertaining to the said scite exceptis omnibus grossis arboribus, boscis & maremio, and further in the said Letters Patents there was a Proviso, that the Lessee should have sufficient House-boot, and Hedge-boot, &c. And if, notwithstanding the said Exception, the Lessee should have the Under-woods, was the question: And it was argued, that the Lessee should have subbois, i. e. Under-woods, for that is granted by express words, and the exception extends only grossis arboribus, by this word (grossis) in the exception extends to all that which follows: Gaudy Justice, If it were in the Case of a common person, its clear, that upon such matter the Under-woods are not excepted, 7 E. 6. Dyer, 79. A Lease is made of a Mannor except Timber and great Woods, the Under-woods shall passe. Fenner Justice, The Proviso, that the Lessee should have House-boot, shewes the Queens intent, that the Under-woods should not passe. Wray, If this word (bois) in the exception should not extend to Under-woods, it should be vain and signifie nothing, which should be had in the Case of the Queen.

Grants of the
King.

CCCXXXV. Trin. 33 Eliz. In the Kings Bench.

In an Action upon the Case the Plaintiff declared of Trover and of a Bag Trover and of mony, and the conversion of it. The Defendant pleaded, that the bag of Conversion, mony was delivered to him as a pawn to keep untill A and B were agreed, which of them should have it, and pleaded further, that A and B were not yet agreed, who of them should have it, for which cause he kept it, absqne hoc, that

he converted it to his own use, upon which the Plaintiff did demur in Law; It was moved that the Conversion is never traversable. Wray, Generally Conversion is not traversable, but upon such speciall matter as is here: D; if A lend money to B, and B delivereth a thing of the value to A in payme, now the Conversion is traversable, see the same case, 4 E. 6. B.^r. Action upon the Case, 213. so here. Fenner agreed with Wray.

Mich. 33. Eliz. In the Kings Bench.

CCCXXXVI. The Bishop of Lincolne and Cowpers Case.

Prohibition.
Tithes.

The Bishop of Lincolne sued a Prohibition against Cowper, who had libelled against him in the Spirituall Court for Tithes out of the Parsonage of D; And the Bishop did suggest, that he and all his Predecessors had been seised of the said Parsonage, and that as long as it was in their possessions, had been discharged of Tithes, and shewed, that in the time of E. 6. the said Parsonage was conveyed to the Duke of Somerset in Fee, and afterwards was re-granted to the Bishop and his Successors; It was moved, That the Prescription was not good, because de non decimando: And admit that the Prescription be good, the same is interrupted by the seisin of the Duke of Somerset, and although that the Parsonage be reassured to the Bishop of Lincolne, yet the Prescription is not revived: as Homage Ancestrell if it be once in a Forraian Seisin, although it be reassured, yet it is not revived. But by Wray, Gawdy, and Fenner, The Prescription is good in the Case of a Spirituall person, but not in the case of a common person. And they all were cleare of opinion, that the Prescription is not gone by this Interruption, so Tithes are not issuing out of the Lands, neither can Unity of possession extinguish them, neither are they extingualshed, by a release of all right of Land, &c. See for this Case, C. 11. part of his Reports in the Case of Pridleam Napper.

33. Eliz. In the Kings Bench.

CCCXXXVII. Dethick, King of Armes Case.

Indictment.

William Dethick, against Garter King of Armes, was indicted upon the Statute of 5 E. 6. for striking in the Church-yard: For that the said Dethick in Pauls Church-yard in London, struck 1 S. It was moved: If Cathedrall Churches be within the meaning of the Statute: The Court was clear of opinion, that they were. And afterwards the Defendant pleaded, Misnomer in an Indictment, that before the Indictment found, he was created and crowned by the Letters Patents of the Queen which he shewed, chiefe and principall King of Armes, and it was granted by the said Letters Patents, that he should be called Garter, and that that name is not in the Indictment, and demanded Judgement: The Kings Attorney by Replication said, That by the Law of Armes and Ordinayre, every one who is made King of Armes before he receiveth his Dignity ought to be led betwixt two Officers of Armes, by the Armes before the Earle Marshall of England, or his Deputy, and before him are to goe four Officers of Armes, whereof the one is to beare his Patent, another a Collar of Esses, the third a Coronet of Brass double guilt, fourthly a Cup of Wine and his Patent shall be read before the Earle Marshall; And afterwards his Coronet shall be set upon his Head, & the Collar of Esses about his neck, & afterwards the Wine poured upon his Head: And that the Defendant had not received these Ceremonies, for which cause he is not King of Armes, nor to be called

upon which the Defendant did demur in Law; Broughton argued for the Defendant, and he took Exception to the Replication, because it is pleaded there, that solum legem heraldorum, Garter upon his Creation made to reside, &c. of which Law, this Court cannot have Conscience, and therefore the Replication ought to be, scil. Solum legem Anglie: As in Appeals the Defendant wage Battell, although that belongs unto Armes and Heraldry, yet it shall be pleaded according to the Law of the Land, and shall not speak of the Law of Armes; So if an Infant be made a Knight, and he to plead in discharge of his Wardship, he shall plead according to the Law of the Land, and yet the degree of a Knight belongs to the Law of Armes, 22 E. 3. Warre against the Earle of Richmond, who was also Duke of Britaine, who pleads to the Wi sit, That he was Duke of Britaine, and not so knowne in the Wi sit, but the Court did not regard it, for they cannot have Jurisdiction of it, so not here as of the Law of Heraldry: Also this Court cannot write to the Heralds to certifie it, as they may to the Marshall of the King, or to the Bishop: But we have sufficiently shewed our matter, scil. That we have Letters Patents of the Queen, and that we were issued in the said Office, and so we are King of England by matter of Record, against which is pleaded only matter in respect of ceremony and circumstance which is not materiall. An Earle is created with the Cerimony of making a Stump hand witt about his boar, and a Cap with a Cross set upon his Head. Yet the King may create an Earle without such Ceremonies: But may also create an Earle by word, if the same be after Record, when a Knight by name, Knights ought to be put upon his Heales, yet without such Ceremonies such degrees may be conferredre to and upon another, for such Ceremonies are to be used or not used at the Kings pleasure: Afterwards it was shewed, that the same is but a name of Office, but not a name of Dignity. To which it was answered, that this name Coronamus, alwaies imports Dignity, as this is a Dignity and Office, as Earle, Marquess, &c. Fennes Justice, The Patent is, Nomen tibi imponimus, and therefore (Garter) is part of his name: And therfore he ought to be audience by such name. And it should be hark to the State and Adversary to Ceremonies. Cowdry was of opinion, That this is but a name of Office, and therefore the Judgment good, as a Mar. Wi sit of Summones of Parliament. Sixthly, without these words (Supream Head) and the Wi sit was holden good, tho it is not part of the name, but a petition only: So here, Fenne and Wray contrary, for the words are Creamus, Coronamus, nomen imponimus. Ergo, part of his name, which Clench also granted, and afterwards Dechick was discharged.

Page. 32. Eliz. Rot. 318. In the Kings Bench.

CCCXXXVIII. Strait and Braggs Case.

In an Action of Trespass, for breaking his Close in H, the Defendant pleaded, that long before the Trespass, the Dean and Chapter of Pauls, were seised of the Maner of C in the said County of H in free, in the Right of their Church, & so seised King Edw. the fourth by his Letters Patents Dat. An. 2. of his Reign granted to them all Fines, pro licentia Concordantie, of all their Managers, and Tenants, Hobants, and Servitians within their free, and shewed, that ever since they had used to have such Fines and recoverd, that 29 Eliz. A Fine was levied in the common Pleas, betwixt the Plaintiff and one A of eleven Acres of Land, whereof the place where is parcell, and the Post fine was assessed to fifteen Millings, and afterwards Scambler the Foreign Opposer did allow to them the said fifteen Millings, because the said Land was within their free. And afterwards in behalf of the said Dean and Chapter, he demanded of the Plaintiff the late fifteen Mil-

Kings, who refused to pay it, wherefore he in the Right of the said Dean, &c.
And by their countenancement took the Distress as Wayly, &c. for the
said fifteen Millions, and afterwards sold it, upon which the Plaintiff
did demur in Law. It was moved, that it is not a verred that the Land where
of the fine was levied was within their Fee, but they say that Scamblab
allowed it to be within their Fee, and the same is not a sufficient Amer-
agement, which the Court granted: And it was the opinion of the Court, That
the Deans and Chapter cannot disclaim for this matter, but they ought to
see to it in the Exchequer, as it appeareth, 2 H. 6. 27. In the Duchesse of
Somerset's Case at Cawdy. This grant doth not extend to the Post Fine, for
Fine pro licencie Concedandi, is the Queens Silver, and not the Post Fine,
Money. All shall pale by it, for it is about one and the same matter, and they
were of opinion to give Judgment for the Plaintiff.

THA. 32. ELIZ. Rot. 451. In the Kings Bench.

CCXXXIX. Sherwood and Nonnes Case.

Covenant.

In all Action of Covenant, the Plaintiff declared, that Charles Grice and
Hester his wife were lessees of certain Tenements called Witchons, with
divers Lands to the same appertaining, and of another parcell of Land called
Dole containing eight Acres, to them and the heirs of the body of the said
Charles on the body of the said Hester his wife lawfully begotten, and so leased,
25 Eliz. leased the same to the Defendant by Indenture for years, by which
Indenture the Lessor covenanteth that the Lessee should have sufficient Wood
for, Feiting Wood, and Woode for wood upon the Lands during the Term,
and that further the Lessor covenanteth for him his Creditors and Assignes,
with the Lessor, &c. That it shoulde be lawfull for them to enter upon the
Lands during the said Term, and to have egresse and regresse there, and to
cut downe and dispose of all the Wood and Timber there growing, leaving
sufficient Wood both Feiting Wood and Woode for wood to the Lessee, upon
the Lands called the Dole, for his expences at Witchons, and further that he
should not take any Wood or Timber upon the Premises, without the assent
or assignment of the Lessor or his Assignes; otherwise, then according to the
Indenture and the true meaning thereof: And further declared, That the
said Charles and his wife so leased, leyyed a Fine of part of the Land to R S
and his heirs, to whom the Defendant attorneed, and that the said R S after-
wards devised the same to his wife, the said Plaintiff for years, the Re-
mainder over to another, and dyed, and that the Defendant had sold and
carried out of the Lands called Witchons, twenty loads of Wood without the
assent and assignment of the Lessor or his Assignes, for which the Plaintiff as
Assignee brought the Action: The Defendant pleaded, That after the Lease
John Grice and others by assignment of Hester had cut downe and carried away
fifty loads of Wood in the said lands called the Dole, and so they had not left
sufficient Woods for his expences at Witchons according to the Indenture,
which cause he took the said twenty loads of Wood upon Witchons for his
expences, upon which the Plaintiff did demur in law. Godfrey. The Plea is
not good: This Plea is no more, but that sufficient Wood was not left upon
the Dole for his expences, and although there be not, yet the Defendant can-
not cut wood elsewhere, for he hath restrained himselfe by the Covenant:
Also the Tenant of the Lessor is, That the Lessee shall have sufficient
Wood upon the Dole for his expences at Witchons, but in his satisfaction he
doth not alledge, that he had need of Wood for to spend at Witchons, nor doth
he say that he hath spent it there, for otherwise he hath not cause to take, &c.
And the meaning was, That the Lessee should have sufficient Wood when he
had need of it. Hobart for the Defendant, He would not speak to the Plea in
Bar,

War, but he conceiveth, that the Declaration was not good, for here no breach of covenant is assigned, for the Covenant is in the Disjunctive, scil. That the Defendant should not take Wood without the assent and assignment of the Lessor or his Assignes; And the Plaintiff chargeth the Defendant with cutting of Wood without the assent or assignment of the Lessor, so he would compell us to prove more then we ought, for if he did it with their assent, or by their assignment only, it is sufficient, but if the Covenant had been in the copulative, both was necessary: And for the nature of Copulatives he cited the Case, where two Church-wardens bring an Action of Trespass, the Defendant pleads, That the Plaintiffs are not Church-wardens, upon which they are at Issue, The Jury find, That the one was Church-warden and the other not, and for that, the Plaintiffs could not have Judgment, for if the one of them be not Church-warden, then the Plaintiffs are not Church-wardens, for the copulatives ought not to be disjoined: And he cited the case lately ruled in the common Pleas betwixt Ognell and Underwood concerning Cruciseld Grange, A leased unto B certaine Lands for forty years, B leased part of the same to C for ten years. A grants a Rent, charge out of the Lands, in tenura & occupatione B. It was resolved, That the Lands leased to C should not be charged with that Rent, for although it was in tenura B, yet it was not in his occupation, and both are requisite, because in the copulative; So here, the Lessor may cut Wood with the assent of the Lessor without any assignment: Also here the substance of the covenant cannot charge the Defendant, for although it be in the Negative, yet it is not absolute in the Negative, but both refer unto the covenant precedent, for the words are, That the Lessee shall not cut Woods, aliter quam, according to the intent of the Indenture, where the covenant precedent is not that the Lessee shall not cut Woods but in the Dole, but that the Lessor might cut down any Trees in the Dole leaving sufficient for the Lessee, which covenant in it selfe doth not restraine the Lessee to cut down any Trees in any part of the Lands demised, nor abridgeth the power which the Law giveth to him by reason of the demise; Then when this last covenant comes, i. e. That the Lessee will not cut, aliter, then according to the meaning of the Indenture without the assent, &c. the same doth not restraine him from the power which the meaning of the Indenture gives, and so no breach of covenant can be assigned in this. For by virtue of the Lease, the Lessee of common Right may take necessary Fuel upon any part of the Land leased: Also this first covenant being in the Affirmativ doth not abridge any Interest, as 28 H. 8. 19. The Lessor covenants, That the Lessee shall have sufficient hedge boar by assignment of the Bark, It is holden by Baldwin and Shelley, That the Lessee may take it without assignment, because there are noe Prohibitive words, & non aliter. So 8 E. 3. 10. A Rent of ten pounds was granted to Husband and Wife, and if the Husband overlive his Wife that he shall have three pounds Rent, and if the Wife do overlive the Husband, she shall have forty shilling: there it was holden that the Rent of ten pounds continued, not restrained by the severance of any of them: And although paraventure it appeareth here, that the meaning of the parties was, That the Lessee should not cut down any Wood but in the Dole, yet for as much as such meaning doth not stand with the Law, it shall be rejected, as it was holden to one in the case betwixt Benet and French, where a man seised of diverse lands, devised parcel of it called Gages, to the creating of a Schoole, and another parcell unto B in Fee, and all his other Lands unto one French in Fee, The devise of Gages was holden void, because too generall, for no person is named, and it was further holden, that it passed by the generall devise to French, and yet that was not the meaning of the Devise: Also the plaintiff is not Assignee but of parcel of the Reversion, for if the Reversion is granted to him for years, and such Assignee cannot have an Action of tress-

lant, for a covenant is a thing in action, and annexed to the Reversion, so that if the Reversion doth not continue in its first course as it was at the time of the creation of the covenant, but be altered or divided, the covenant is destroyed, and therefore it was holden, 32 H. 8. Belvoir Wifeman and Warringer, where a Lease for years was made of one hundred Acres of Lands, rending ten pound Rent, and afterwards the Lessor granted fifty Acres of it, that the Grantee should not have any part of the Rent, but all the Rent was destroyed. So in our case here, the Grantee hath but parcell of the estate, a Herne for years, and so is not an Assignee intended, as the case between Randall and Browne in the court of Wardrs: Randall being seised of certayne Lands, covenanted with B, that if he pay unto him, his Heirs, and Assignes five hundred pounds, that then he and his Heirs would stand seised to the use of the said B and his Heirs; Randall devised the Land to his Wife during the minority of his Son, the Remainder to his Son in Free and tyme, having made his Wife his Executrix: Browne at the day and place named the money generally, the Wife having but an estate for years in the Land, took the money. It was holden, that the same was not a sufficient tender, for the Wife is not Assignee, for she hath an Interest but for years, and bys, the Son is to beare the losse, for by a lawfull tender the Inheritance shall be devested out of him, and therefore the tender ought to be made to him and not to the Wife. Also as the case is here, he is no Assignee, for although Charles Grice and his Wife hath the Reversion, to them and the Heires of the body of Charles, and levy a Fine without Proclamations, nothing passeth but his owne estate, and then the Consee hath not any estate, but during the life of Charles, and then when a man is seised to him and his Heirs during the life of another, he hath not such an estate as he can devise by the Statute, and then when he devileth it to his Wife for years, it is void, &c. It was argued.

Trin. 33 Eliz. In the Kings Bench.

CCCXL. Smith and Hitchcocks Case.

Assumpit.

In an Action upon the case, the Plaintiff declared, that whereas the Defendant was indebted unto him, 19 Maij 30 Eliz. The Defendant in consideration that the Plaintiff would forbear to sue him untill such a day after, promised at the said day to pay the debt: The Defendant pleaded, hys that 29. Maij, 29 Eliz. He was indebted unto the Plaintiff in the said sum, for assurance of which, afterwards he acknowledged a Statute to the Plaintiff, upon which he had execution, and had lebyed the money, absque hoc, that he was indebted to the Plaintiff, antea, vel post, the said day, aliquo modo, upon which the Plaintiff did demur. It was argued that the Traverse was not good, for the consideration in Assumpit is not traversable, because it is but conveyance, and amount to the generall Issue, as in debt upon the sale of a House, it is no Plea for the Defendant to say, that no such House was sold to him. Partridge, If the conveyance be the ground of the suit it is traversable, an Action upon the case against an Hostler, it is a good Plea that he is not an Hostler, 2 H. 4. 7. See 26 H. 8. Br. Traverse, 341. In an Action upon the case, the Plaintiff declared, that whereas the Defendant, habuit ex deliberatione, of the Plaintiff certain goods, the said Defendant in consideration of ten shillings, Assumpit & eidem querenti promisit salvo Custodiæ, &c. Non habuit ex deliberatione, is a good Plea. Godfrey, The Defendant doth not answer the point of our Action, which is the Assumpit, but only by way of Argument, 11 E. 4. 4. In Trespals upon the Statute of 5 R. 2. by the Master of a Colledge and his conciers, the Defendant doth justifie by reason

Reason of a Lease made by a Predecessor of the Plaintiff, and his Consteers by their Deed under their common Seal, the Plaintiff, Replicando saith, That at the time of the making of the Lease, there was no such Collidge, and it was holden no Plea, for it is no answer but by Argument. Gawdy Justice, In all cases whers the Defendant may wage his Law, there the conveyance is traversable: Wray, The cause of the Action is the Assumpſit, therefore the consideration is not traversable, for it is not the point with which the Plaintiff is charged; And it is common here, that the Declaration in such Action upon the case, in consideration of diverse sums of money, without any more certainty is good, which should not be good, if the consideration were traversable, but the consideration is to be given in Evidence, and it is also common, that in an Action upon the case in Trover and Conversion, the Trover is not traversable, for the Conversion is the point of the Action: Fenner Justice, The debt here is not the cause of the Action, but only the Assumpſit. In debt upon Arbitrament, the Arbitrament is traversable; So in debt for Rent up, on a Demise, the Demise is traversable, for the Arbitrament, and Demise is the cause and ground of the Action: At another day it was moved againe, and Gawdy, mutata opinione said, that consideration Executory, is traversable: as where one in consideration, that he may marry my Daughter, or of service promiseth to pay, the same consideration is traversable, contrary of a consideration exacted: And afterwards Judgement was given for the Plaintiff.

Trin. 33 Eliz. In the Court of Wards.

CCCXLI. Estons Case.

Æeon was seised of Lands in Fee holden of the King in cheife, and took a wife seised of other Lands holden in Socage, they have Issue, and the Husband dyeth; And afterwards the wife dyeth: Owen Serjeant conveiued, That the Queen should not have the Wardship of the Land of the wife, or the primer seisin of it: And if the Husband had sur diued his wife being Tenant by the Curtesie, the Queen should not have Primer seisin of it after his decease; Wray, If the Father be seised of Lands holden in Socage, and the Mother of Lands holden in Knights service, and the Husband after dies his wife being Tenant by the Curtesie, the King shall have all: Anderson denied that, & he conceiued, That the opinion of Stamford is not Law, and yet see 13 H 4. 278. Where the Father is seised of Lands in cheife, and the mother of other, and the Father dyeth, and afterwards the Mother dyeth, both shall be in ward. And it was said, That if there be Grandfather, Father, and Son, and the Father dyeth seised of Lands holden in Socage, and afterwards the Grandfather dyeth seised of Lands in Knights service, the Lands in Socage shall not be in ward: Anderson held strongly, That the Queen should have Primer seisin of the Lands of the Mother: Wray contrary, Quare.

Trin. 33. Eliz. In the Court of Wards.

CCCXLII. Ellis Hartops Case.

Ellis Hartop was seised of diverse Lands, whereof part was holden of the King in Knights service, and devised two parts thereof to W Denham and his Heires, to the use of T his Brother, and his wife, and afterwards to the use of the said T and his Heirs malis, T dyed in the life of the Devisor, and afterwards

terwards a Son is borne; First it was agreed that a Devise might be to the use of another; Then, when Cestuy que use dyeth in the life of the Devisor, the Devisee shall take it, and when a Son is borne, it shall goe to him; But if the use be void, then the Devisee shall have it to his own use, for every devise doth imply a consideration: Coke was of opinion, That the Son takes by descent, when Cestuy que use, to whom Land is devised, doth refuse the use, the Devisee cannot take it, for he shall not have it to his own use, for if the use be void, the devise is also void; And the use is void, for Cestuy que use dyeth in the life of the Devisor, which see Bret and Rygden's case. A man seised of three Acres bargaines and sells one of them, without shewing which, and that before the Statute of 27 H. 8. The Bargainer dyeth before Election, no Election descends to the Heire, for then he should be a Purchasor: And by Wray, and Anderson, The devise is void, and it is all one with Brett and Rygden's case. And by Anderson, a man deviseth Lands to the use of one, which use by possibility is good, and by possibility not good; If afterwards Cestuy que use cannot take, the Devisee shall be to the use of the Devisor and his Heires.

Trin. 33. Eiz. In the Kings Bench.

CCCLXIII. Weston and Garmons Case.

Assize.

Asse was brought of a Rent of fifty pounds per annum, and the Plaintiff made his plaint to be disseised of his Free-hold in H E, and H W: And sheweth, that John Vaughan and Amy his wife, who before was the wife of one Weston, and Mother of Sir Henry Weston, the Plaintiff in the Assize was seised of the said Mannors of H W, and H E, lying in Barton and Kinton in Fez. And 18 Eliz. A Fine was levied betwixt Robert Vaughan, and Miles Whitney complainants, and the said John Vaughan and Amy his wife, and Francis their Son Descendants of the said two Mannors, inter alia per nomina, of the Mannors of H E, and H W, and of fifty Hectrees, three hundred Acres of Lands, two hundred Acres of Meadow, cum pertinencij, in the said Townes, by which Fine the said Descendants, did acknowledge the right of the said Mannors and Tenements, to be the Right of the Complainants, come et cetera, with warranty, of the said Husband and Wife, for which the Complainants did render a Rent of fifty pounds, per annum, with clause of distress, in dictis Manerijis, to the said John and Amy, and the Heirs of Amy, and also rendered the Tenements aforesaid, with the Appurtenances to the said John and Amy for their lives, the Remainder to the said Francis their Son in tail, the Remainder to the said Amy and her Heirs, and that John and Amy dyed, by force whereof the said Rent descended to the said Plaintiff, as Son and Heire of the said Amy, and that the said Francis entered into the said Mannors as in his Remainder, and was seised in t.l., and was seised of the said Rent by the Hand of the said Francis, and afterwards thereof did enfeoff the said Garmons the Defendant, &c. The Tenant pleaded, That the Plaintiff was never seised so as he could be disseised, and if, &c. Nul tenet, nul disseisin, which was found for the Plaintiff who had Judgement and Execution, upon which the Tenant brought a writ of Error: Stephens assigned Error, First, the Fine is levied of two Mannors, inter alia, so as to other Lands passed by the Fine besides the Mannors, and so the Rent is granted out of the said Lands and Mannors, and no other Lands which passed by the Fine, and then upon the Plaintiff's own shewing it appears, that all the Tenants of the Lands charged with the Rent in demand, are not named in the Assize: Secondly, Error: This Rent is granted only out of the Estate tail, for Amy hath Fee in both as well the Rent as the Land, and then when

the estate tail is determined, the Rent is also determined, and he hath not altered the life of the Tenant in tail, or any of his Issue, wherefore it shall be intended that he is dead without issue, and then the Rent is gone, and then he hath not any cause to have Allize: Bourchier, As to the first conceived and argued that it is not Error, for although these words (inter alia, &c.) yet it shall not be intended that the Conuso^r had any other Lands or that the Rent is issuing out of other Lands then those two Hanno^rs which are expressed, & not inde-
that: As to the second, the continuance of the tail needs not to be averred, for the Tenant in tail hath enfeoffed the Tenant of the Land, by which the estate tail is discontinued; And although the Tenant in tail be dead without issue, yet the Rent doth remaine until Recovery of the Land by Formedon in the Remainder. Fenner Justice was of opinion, That the per nomen should go unto the Hanno^rs only, and should not extend to the inter alia: For if a man in pleading saith, that J. S. was seised of twenty acres of Land, and thereof (inter alia) did enfeoff him per nomen of Green-weade, the same shall not have reference to the inter alia, but only to the twenty acres: And the averment of the continuance of the Tail needs not, for the Estate tail is discontinued. Gawdy Justice was of opinion, That the per nomen should go as well to the interalia, as to the two Hanno^rs, and then all the Tenants are not named in the Allise, and the same needs not to be pleaded, for it appears of the Plaintiffs own shewing, and there needs no averment of the continuance of the Tail for the cause aforesaid. Clerch Justice, The per nomen doth refer to all, which see by the Fine, which shewes that other Lands passed by the Fine, then the said two Hanno^rs. And as to the second point he said, There needed no averment. Gawdy, As to the first Error, the same cannot be set by any way, but to say, That the Conuso^r was not seised of any other Lands then the said two Hanno^rs, and then the Fine doth not extend unto it, and then no Rent is granted out of it. Fenner, In the Common Pleas, in the great case of Fines, it was holden, That in Pleading of a Fine, it needs not to say, That the Conuso^r was seised, for if the Conuso^r or Conusee were seised, it is sufficient: for such pleading is contrary in it self; for a Fine, for Conulsans de droit come ces, &c. doth suppose a precedent Gift: It was also objected, That here is a confusion in this Fine, for the Rent is rendered to the Husband and Wife, and to the Heires of the Wife, and the Land is rendered to the Husband and Wife for their lives, the Remainder to Francis in Tail, the Remainder to the Wife and her Heires: And these matters cannot stand together in a Fine, but the one will confound the other: But as to that, it was said, that the Law shall Marshall these two renders, so as they both shall stand: And it is not like unto a Rent-service, for a Rent-service issueth out of the whole Estate: And therefore is a Remainder upon an Estate for life, the Seigniorie is gone even during the life of the Tenant for life; which see, 3 H. 6. I. contrary of a Rent-charge: For if the Grantee of a Rent in Fee purchaseth the remainder of the Land out of which it is depending out of an Estate for life, he shall have the Rent during the life of the Tenant for life. And of that opinion were all the three Justices, for the Conuso^rs took by severall Acts, and the Estate is charged, soz it cometh under the Grant. Fenner Justice, There is a difference betwixt a Rent service and a Rent-charge, or Common, for that shall charge only the possession, but a Rent-charge shall charge the whole Estate: And therefore if he who hath a Rent-service releaseth to him in the Remainder upon an Estate-tail, or for life, the Rent is extint; which Gawdy denied: And this Case was put, The Dileesee doth release to the Lessee for yeares of his Dileesor, nihil operatur: But if the Dileesor and Dileesee joyn in a Release to such Lessee the same is good, for first it shall ensue as the Release of the Dileesor, and then of the Dileesee, &c.

Mic. 32 & 33 Eliz. In the Kings Bench.

CCCXLIV Tedeschel and Hallywells Case.

Debt:

In a Debt upon a Bond, the Defendant pleaded, That the Condition was, That whereas John Hallywell had put himself to be an Apprentice to the Plaintiff, or the Defendant John Hallywell during his Apprentiship, or any other for him by his consent or agreement take, or riotously spend any of the Goods of his said Master the Plaintiff: If then the Defendant within one month after notice thereof given to him, do pay and satisfy the Plaintiff in all such summe of moneth, Mates, &c. so taken, or riotously spent by the Defendant, or by any other by his procurement or consent, the same being sufficiently proved: That then, &c. The Defendant by protestation, Quod nec ipse, nos any other by his procurement or consent had taken, or riotously spent the Goods of the Plaintiff: he pleas saith, That the Plaintiff before the Suit brought had not sufficiently proved, that the said John Hallywell took, or riotously spent any of the Plaintiffs Goods: Upon which the Plaintiff did demur in Main. It was argued by Daniel, That the proof is sufficient and good for the time, if it be tried in the Action upon this Obligation and the proof intended is proof by that be men, for it is not set downe before what person it shall be proven, nor any manner of proof appointed, and therefore it shall be tried according to the Law of the Land: which see 10 E. 11. 7 R. 2 bar 24. Godfrey contrary, This case is not like to the cases before, for here is a further matter. First mounting, and a month after notice pay, &c. And if the proof shall be more in this Action, the Defendant shall have the benefit of the Condition, which gives time to pay it within a month after: for in all such cases the precedent Statute of the Obligee is traversable, as 10 H. 7. 13. I am bound by Obligation to enfeoff such a person as such Laws as the Obliges shall appoint. In an action brought against me, I shall say, That the Plaintiff hath not appointed, &c. And here ought to be notice first, and proof ought to witness the notice by the meaning of the condition, and is this differs from the other cases put, for here proof is not the substance of the whole: Owen Merjeant, It is the sole of the Defendant to lye himselfe to such an inconvenience, for now he ought to pay the money without delay of any moneth: And here the Defendant ought to plead, That he hath not imbeheld any goods of the Plaintiff, and the Plaintiff Replicando, shall say, And shew the speciall matter that he hath giben notice to him thereof: See 35 E. 4. 25.

18. Eliz. In the Kings Bench

CCCLV. Manning and Andrewes Case.

Devise.

In Electione firmæ, the Jury found by speciall Verdit: That Richard Hart, and Katherine his Wife, and diverse other persons, 1 H. 8. were seised of the Lands in question, to the use of Richard and his Heirs, ad perpetuam ultimam volunt. dict. Rich. who the first of August, 8 H. 8. by his Will in writing devised, That his feasters should be from thenceforth seised in the use of his said Will for her life, and after to the use of W H his Son in his life, without impeachment of Waste, and after the death of the said Katherine his wife, William his Son, and Joan wife of the said William, his Feasters should be seised to the use of the next heire of the body of the said William and Joan lawfully begotten, for the terme of the life of the same Heire,

and after the decease of the same Heire, to the use of the next heir, of the same heire lawfully begotten, and for default of such issue, to the use of the heirs of the body of the said William and Joan lawfully begotten, for the terme of life or lives of every such heire, or heirs, and for default of such heires to the use of the heirs of the body of the said William, and for default, &c. to the right heirs of William: And further he willed, That if any of the said heires shall sell, alien, lay to mortgage, the right, title, and interest which they or any of them shall have in or out of the same Lands, or by their consent or assent suffer any Recovery to be had against them, &c. &c; by any other Act, whereby they or their heirs, or any of them may or ought to be disinherited; That then the use limited to such heire so doing, shall be void and of noe force during his life: And that his said Feoffees shall be thenceforth lesed to the use of the heire apparent of such Offender as though he were dead: Richard Hart dyed, William had issue by the said Joan his wife, a son named Thomas and dyed, and afterwards, 21 H. 8. Joan dyed, Katharine dyed, Thomas entred, and had Issue Francis and Percivall: Thomas by Deed indentured, 1 August, 4. Eliz. Bargained and sold to Andrewes, and leyyed a fine to him with warranty: And afterwards, 6 Eliz. Francis leyyed a fine to the said Andrewes, Sur conusans de droit come ceo: And further by the said fine released to him with warranty, at the time of which fine leyyed, Percivall was heire apparent to the said Francis. Francis after had issue I and F who are now living: The Wre of the Souribor of the Feoffees within five years after the age of Percivall and seven years after the fine leyyed, enter to revive the use limited to Percivall, who entred, and leased to the Plaintiff. This case was argued by the Justices of the Kings Bench, &c. First, It was agreed by the whole Court, That Richard Hart being lesed with seven others, unto the use of himselfe and his Heirs, might well devise all the use, although his use was in part suspended because he was jointly lesed with seven others, to his own use, and so the use for the eighth part suspended, for when this devise is to take effect, i.e. at the time of his death, all the possession of the Land by the Souribor passeth from the use, and then the use being withdrawal from the possession shall well passe: And by Wray, A use suspended may be devised: As if Feoffees to use before the Statute of 27 H. 8. be dissolved, by which dissolution the use is suspended, and afterwards during the dissolution, Cestay que use, by his will dissolved. That his feoffees shall re-enter and then make an estate to I S in fee, the same is a good devise, for by that devise in the trust and confidence reposed by Cestay que use, in the feoffees, is not suspended: Secondly, It was holden that here, a use implied was limited to Joan the wife of William, although there be not any expresse devise of it, according to the Book of 13 H. 7. 17. Thirdly, when a use is limited to the Heire of the body of William and Joan lawfully begotten for life, and afterwards to the heire of the body of the same heire for life, &c. Gofry Justice was of opinion, That here is in effect an estate tayle, for the estates limited are directed to goe in course of an estate tail, for he wills, That every heire of the body of his Son shall have the Land, and the speciall words shall not make another estate to passe, but that which the Law wills, As if Lands be given to one for life, the Remainder after his death to the Heire of his body lawfully begotten, notwithstanding that the words of the limitation imply two severall estates, yet because the Law so wills, it is but one estate: Gaway Justice said, That every issue begotten betwixt William and Joan, should have an estate for life successiue, and a Remainder in tail expestant as right heire of the body of William, and this estate tail shall not be executed in possession by reason of the mesne Remainders for life limited to the heire of the body of William and Joan, and although that these mesne Remainders are but upon a contingent, and not in esse, yet such regard shall be had to them, that

use suspended
by his will dissolved

A Contingent
shall binder
the execution
of an estate in
the possession,

they shall hinder the execution of the estates for life, and in tail in possession: As if an estate be made to A for life, the Remainder to the right heirs of B in tail, the Remainder in fee to A, although the estate fall be in obeyance, and not in esse during the life of B, yet in respect thereof the Free-hold and Fee shall not be conjoined. Southcote Justice, To the same purpose: And he put a case lately adynged betwixt Vaughan and Alcock: Land was devised to two men, and if any of them dyeth, his heirs shall inherit, these devisees are

Vaughan and
 Alcocks case.

Tenants in common, because in by devise, but contrary if it were by way of Grant: Lands are devised to A and B to be betwixt them divided, they are Tenants in common: Wray, William and Thomas have but for life, for they are *Part habees* by the name (heire) in the singular number, but when he goes further, and says, for want of such issue to the heirs of the body of William, in the plural number, now William hath an Inheritance: And if a devise be made to one for life, and then to his heire for life, and so from heire to heire in perpetuum for life, here are two estates for life, and the other Devisees have Fee, for estates for life cannot be limited by generall words from heire to heire, but by sp. ciall words they may: And here, Thomas being next heire of the body of William and Joan, hath an estate for life, and also being heire of the body of the said William, hath a Remainder in tail to him limited, & the mesme remaineth limited to others, i. e. to the next heire of the body of Thomas, being in obeyance because limited by the name heire, his Father being alib: shall not hinder the execution of these estates, but they shall remaine in force according to the rules of the common Law: Then Thomas so being seised levyeth a Fine against the Provisiou of the Will, by which Thomas hath souleved his estate for life, and so his next heire shall have the Land during his life: And a great reason wherfore the heires, or supra, after the two first limitations shall have bail, is, because that if every heire should have but for life, they should never have any Interest in the Lands by these limitations, for by the expresse words of the devise, none shall take but the heire of the first heire for ever, i. e. When Thomas Aliens, by which the use vests in Francis, and when afterwards Francis levyeth a Fine, then the use vests in Percivall Hart, being next heire of the said Francis at the time of the Fine levyed (notwithstanding that afterwards Francis hath a Son which is his next heire) and therefore the use in Percivall by the birth of the said Son in Francis shall not be devested, because it was a thing vested in him before by purchase, 9 H. 7. 25. A enfeoffeth B upon condition on the part of A to be performed, and dyeth, having issue a Daughter, the Daughter perfornes the condition, and afterwards a Son is borne, the Daughter shall hold the Lands against the Son: So 5 E. 4. 6. A woman hath issue a Daughter, and afterwards consents to a Husband, the Daughter enters, and afterwards a Son is borne, yet the Daughter shall hold the Lands for ever, i. e. Am Geofries Justice said Francis being in by force of the Forfeiture, shall not be subject to the limitation of the Will, i. e. to any forfeiture if he alien, for the estate which Francis hath for his life is but an estate gained by the offence of his Father, and the use was limited to him upon the Will of Richard, and then the said estate is not subject to the Proviso of the Will, and then hath not Francis committed any forfeiture: And admit Francis shall sofeyt, yet Percivall shall get nothing thereby, but the estate which Francis had at the time of the Fine levyed, scil. the Free-hold only, for no estate of Inheritance was in him living his Father, i. e. As to the regale of the Feoffees, Geofries was of opinion, That where an use is limited to a person certain, and thereupon vested in the person to whom it is limited, That the Entry of the Feoffees in such case is not requisite, notwithstanding that the first estates be discontinued, but wheres the use (as in our case) is not limited to a person certain in esse, but is in obeyance, not vested in any person upon the limitation of it, some estate ought to be left in the

Estate vested,
 shall not be
 devested.

the Feoffees to maintain that use, and to render it according to the limitation, and in our case, these uses not in esse at the time of the making of the Statute of 27 H.8. could not be executed by the said Statute, but now at the appointed time by the limitation shall be raised and revived by the Entry of the Feoffees, but here by the Fine and Non-claim, the Feoffees are bound, and their Entry taken away, and so no use can accrue to Percival Hart by such Entry. Southcote Justice was of opinion, that the Feoffees cannot enter at all, because that by the Statute of 27. H.8. nothing is left in them at the time of the making of the Statute, which saves the rights of every person, &c. other than the Feoffees, so as no right is saved to them but all is drawn out of them by the operation of the Statute, and the second saving of the Statute, saves to the Feoffees all their former Right, so as the Right which the Feoffees had by the Feoffment to the use is utterly gone. But Percival Hart may well enter, for he is not bound to the five years after the Fine levied, for he had not right at the time of the Fine levied, but his right came by the Fine, Wray chief Justice. The Feoffees are not to enter for the Statute of 27 H.8. hath two branches, 1. gives the possession to Cestuy que use. in such manner as he hath in the use. 2. takes away all the right out of the Feoffees, and gives it to Cestuy que use, so as nothing at all remains in the Feoffees; for if an Act of Parliament will give to me all the Lands, whereof my brother Southcote is seised, and that I shall be in the Possession thereof, now is the actuall possession in me without my Entry: so always, where an use is often executed by the Statute, Cestuy que use, without any Entry hath an actuall possession. 1. As to the uses contingent, nothing remains in the Feoffees for the serving of them when they happen, but the whole estate is settled in the Cestuy que use, yet subject to such use, and he shall render the same upon the contingency: And if any estate should remain in the Feoffees, it could be but an estate for life, for the Fee simple is executed in Cestuy que use, with an estate in possession, and then the Feoffees should be seised to another use than was given by them the Livery. Also if a Feoffment be made unto the use of the Feoffor, and his heirs, until J.S. hath paid unto the Feoffor 100 l. and from thenceforth the Feoffor and his heirs shall be seised to the use of the said J. S. and his heirs, if upon such Feoffment any thing should remain in the Feoffees before the payment by J.S. the same should be a Fee simple, and then there should be two Fee simples of one and the same Lands, one in the Feoffor, and the other in the Feoffees which should be abusurde, and therefore the best way to avoid such inconveniences is to construe the Statute, that it drawes the whole estate of the Land, and also the confidence out of the Feoffees, and repositeth it upon the Lands, the which by the operation of the Statute, shall render the use to every person in his time according to the limitation of the parties: And also if any Interest doth remaine in the Feoffees, Then if they convey to any person upon consideration who hath not notice of the use, then the said use shall never rise, which is utterly against the meaning of the said Statute, and the meaning of the parties, and therefore, to construe the Statute, to leave nothing in the Feoffees will prevent all such mischeif: And if a Feoffment in fee be made to the use of the Feoffor for life, and afterwards to the use of his wife which shall be for life, and afterwards to the use of the right Heirs of the Feoffor; The Feoffor enfeoffeth a stranger, taketh a wife, now cannot the Feoffees enter during the life of the Feoffor, and after his death they cannot enter, because they could not enter when the use to the wife was to begin, upon the intermarriage, & then if the Entry of the Feoffees in such case should be requisite, the use limited to the wife by the Act of the Feoffor should be destroyed against his own limitation, which is strong against the meaning of the Act aforesaid, for by the said act, the Land is credited with the said use;

which shall never fail in the performance of it. And such contingent estates in Remainder may be limited in possession, a Fortiori in use, which see 4 E. 6. Colchirs case, 23. And Plesingtons case, 6 R. 2. And it is true, at the common Law, the Entry of the Feoffees was requisite, because the wrong was done unto them by reason of the possession which they then had, but now by the Statute, all is drawn out of them, and then there is no reason that they medle with the Lands wherein they have now nothing to doe, and the scope of the Statute is, utterly to disable the Feoffees to do any thing in prejudice of the uses limited, so as the Feoffees are not to any purpose but as a Pipe to convey the Lands to others; So as they cannot by their Release or confirmation, &c. bind the uses which are to grow and arise by the limitation knit into the Feoffment made unto them, which see Br. 30 H. 8. Feoffments to uses, 50. A covenants with B. That when A shall be enfeoffed by B of three Acres of Lands in D. that then the said A and his Heires shall be seised of Land of the said A, in S. to the use of B and his Heires, and afterwards A enfeoffeth a stranger of his Lands in S; And afterwards B enfeoffeth A of his Lands in D, now the Feoffee of A shall be seised to the use of B, notwithstanding that the said Feoffee had not notice of the use, for the Land is bound with the use in whose hands soever it come: And see the like case, ibid. 1. Ma. 39. Upon the reason of which cases many assurances have been made, for it is the common manner of Mortgage, i. e. If the Mortgagor pay such a sum, &c. that then the Mortgagor and his Heires shall be seised after such payment to the use of the Mortgagor and his Heires; In that case although that the Mortgagor alien, yet upon the payment, the use shall rise well enough out of the possession of the Alienee, and the Lands shall be in the Mortgagor without any Entry: For the Mortgagor could not enter against his own alienation, to redive the use which is to rise upon the payment, and therefore without any assistance of such Entry, it shall arise: As at the common Law, Land is given to A in tail, the Remainder to the right heirs of B, A levies a fine, makes a Feoffment, suffers a Recovery, &c. although the same shall bind the Issues, yet if B dyeth, and afterwards A dyeth without issue, now notwithstanding this fine, &c. The right Heir of B may enter: And always a use shall spring out of the Land at his due opportunity, & it is a collateral charge which binds the Lands by the strict Law, and cannot be discharged, vi. 49. Ass. 8. & 49 E. 3. 16. Isabell Goodcheapes case: A man devileth, that his Executors shall sell his Lands, and afterwards dyeth without heire, so as the Land escheats to the King, yet the authority given to the Executors shall bind the Lands in whose hands soever it comes, &c. And so a title of Entry doth continue notwithstanding twenty alienations: But an use is a lesser thing then a Title of Entry, especially an use in contingent, and an use as long as it is in contingency cannot be forfeited: As if the Mortgagor be attainted and pardoned mean betwixt the Mortgage and the day of Redemption, &c. Then when Thomas levies a fine, Francis may well enter; And Thomas before the fine had an estate tail executed to his free hold, and therefore by the fine he gave an estate of Inheritance to the Conusee, and then no right of entail remained in Francis, but he took an estate for life only, and that as a Purchasor by the limitation of the Will, and then when Francis levied a fine, his estate was gone (which was but for life) and then the right of the entail, and all the other estates which are especially limited are also gone, and so Percivall Hart, to whom no estate was specially limited hath not any cause to enter, &c. And it was further said by Wray: Husband and wife Tenants in special tail, the Husband levies a fine with Proclamations and dyeth, the wife enters, the issue in tail is barred, but if the wife enter after the death of her Husband, and before the Proclamations passe, the issue is not bound by the fine: And if Tenant in tail granteth, to cum sta-

tum sum, and after leveth a Fine thereof with Proclamations, come &c. The Issue is barred, contrary where the Fine is upon a Release, &c.

18. Eliz. In the Kings Bench.

CCCXLVI. Henningham and Windhams Case.

A Arthur Henningham brought a Writ of Error against Francis Windham upon a common Recovery had against Henry his Brother, and the Error. Case was, That Land was given in special tail to Thomas Henningham, father of the said Henry and the said Arthur, the Remainder in general tail (the estate tail in possession was to him and the Heirs Males of his body) Thomas had issue the said Henry and three Daughters by one woman, and the said Arthur and two other sons by another woman, and dyed seised, Henry entered, and made a Freshment, a common Recovery is had against the Fee-offee, in which Henry is touched, who vouches over the common Gouache according to the usual course of common Recoveries, Henry dyed without issue, taint, by him And Arthur brought a Writ of Error being but of the halfe blood to Henry; to whom the And it was resolved by the whole Court, That Error and Attaint allways Land is to descend. descends to such person to whom the Land should descend: If such Recovery, a false oath had not been; As if Lands be given to one and the Heirs females of his body, &c. and suffers an erroneous Recovery and dyeth, the heir female shall have the Writ of Error: So upon Recovery of Lands in Borough English, for such Action descends according to the Land, quod sicut concilium per totam Curiam: But it was objected on the Defendants part: That because that the Freshment being Tenant to the Precipe is to recover in value a Freshmyle; & so Henry is to yeild a Fee-Simple which should descend to his heirs at the common Law if this Recovery had not been, therefore he to whom the same should descend, should have the Writ of Error, for he hath the loss: But the said Exception was not allowed: And it was said, That Tenant in tail upon such a Recovery, shall recover but an estate in tail, scil. such estate which he had at the time of the warranty made, &c. And afterwards Judgment was given that the Action was maintainable: So if a man hath Lands of the part of his mother, and loseth it by erroneous Judgment and dyeth; That the heir of the part of the Mother shall have the Writ of Error.

18. Eliz. in the Kings Bench.

CCCXLVII. Foster and Pitfalls Case:

In Ejectione firmz the Case was: Brook devised Lands to his Wife in general Tail, the Remainder over to a stranger in Fee, and dyed, Shee took another Husband, and had issue a Daughter: The Husband and Wife leyyed a Fine to a stranger: The Daughter as next Heire by 11 H. 7. entred: It was agreed by the whole Court, That an estate devised to the wife, is within the words, but not within the meaning of the Statute: Secondly, It is resolved, That no estate is within the meaning of the Statute, unless it be for the Joynure of the Wife: Thirdly Resolved, That the meaning of the Statute was, That the wife so preferred by the Husband should not prejudice the issues or heires of her Husband, and here nothing is left in the Issues or heirs of the Husband, so as the wife could not prejudice them, for the Remainder is limited over.

18. Eliz. In the Kings Bench.

CCCXLVIII. Greene's Case.

Acceptance of Rent. **G**Reene made a Lease for years rendering Rent with clause of Re-entry, and the rent due at the Feast of the Annunciation was behind being demanded at the day, which Rent the Lessor afterwards accepted, & afterwards entered for the condition broken, and his Entry holden lawfull, for the Rent was due before the condition broken, but if the Lessor accepts the next Quarters Rent, then he hath lost the benefit of Re-entry, for thereby he admits the Lessee to be his Tenant: And if the Lessor distraine for Rent due at the said Feast of the Annunciation after the forfeiture he cannot afterwards re-enter for the said forfeiture, for by his Distresse he hath affirmed the possession of the Lessee: So if he make an acquittance for the Rent as a Rent, contrary, if the acquittance be but for a sum of money, and not ex pressley for the Rent, all which, cota curia concessit.

CCCXLIX. 20. Eliz. In the common Pleas.

*Entry for forfeiture.**Livery of seisin.*

The Case was, Lessee for life, the Remainder for life, the Remainder in tail, the Remainder in Fee; The two Tenants for life make a Feoffment in Fee. Dyer, A woman Tenant for life in Joynure, the Remainder for life, the Remainder in fee, the Tenants for life joyn in a Feoffment, the Entry of him in the Remainder in fee is lawfull by 1 H. 7. And if Tenant for life be impleaded, and he in the Remainder for life will not pay to be reserved, he in the last Remainder may, and so in our case, in as much as he in the Remainder for life was party to the wrong, he in the Remainder in tail shall enter: Which Harper and Maneson granted, i. e. Manwood, Although that this Feoffment be not a Disseisin to him in the Remainder in tail, yet it is a wrong in a high degree, as by Littleton, A Disseisor leases for life to A who aliens in fee, the Disseisor releaseth to the Alienee, it is a good Release, and the Disseisor shall not enter although the Alienation was to his disinheritance, Litt. 111. which Dyer granted: And if Tenant for life alieneth in fee, and the Alienee enfeoffeth his Father and dyeth, the same disseisor shall not abayle him no more then in case of Disseisin: It hath been objected, that that is the Livery of the first Tenant for life, and the confirmation of him in the Remainder for life, Dyer was of opinion, That by this Livery the Remainder for life passeth, & this Livery shall be as well the Livery of him in the Remainder as of the Tenant in possession, & although where an estate is made lawfully by many, it shall be said the Livery of him only who lawfully may make Livery; Yet where an estate is wrongfully made it shall be accounted in Law, the Livery of al who joyn in it. And in this, the Remainder for life is extinguished by the Livery, in the Feoffee, and the Livery of him in the Remainder for life shall be holden a void Livery, especially when he joyns with such a person who hath not authority to make Livery; As if the Lord and a stranger disseise the Tenant and make a Feoffment over, the whols Heigniory is extinct, as if he sole had been seised, so if he in the Reversion, and a stranger disseise for life, and make a Feoffment over, the Heigniory is gone, and yet it is the Livery of the Lessee only: And althoough it be but the confirmation of him in the Remainder for life, yet thereby the Remainder is gone and extinct: And afterwards Judgment was given, that the Entry of him in the Remainder in tail was lawfull: And it was said by the Lord Dyer, That if Tenant for life be the Remainder for life, the Remainder in fee,

Tenant

Tenant for life, in possession alieneth in fee, that he in the Remainder in
fee cannot enter, for it was not to his inheritance.

CCCL. 20. Eliz. In the Kings Bench.

The Case was; That a Capias ad Satisfaciend. was delivered to the Sheriff, and after the Sheriff did arrest the party against whom the Capias issued, by force of a Capias Ut lagatum, and then the partie in the Capias came to the Sheriff, and prayed that the party remaine in Execution for his debt also, and notwithstanding that the Sheriff let the Prisoner goe at large, and upon both Writs returned, Non est inventus. It was the opinion of all the Justices, That the Sheriff was not bound in point of Escape to detain the Prisoner for the Debt of the Plaintiff, and it is not like, where one is in the Fleet in Execution, there, if other condemnations in other Courts be notified to the Warden of the Fleet, he shall be chargeable with them all. It was holden alson, per curiam, That if the body had been returned by Capias Ut lagatum, that the Court at the prayer of the partie would grant that the Prisoner might remaine in Execution for the debt as in case of a Capias pro sueo.

19. Eliz. In the common Pleas.

CCCLI. The Lord Saint John, and the Countesse
of Kents Case.

Grants of Ex-
ecutors of one
another sua,

In Evidence given to the Jury in an Action of Debt brought by the Plaintiff against the Defendant: It was said by Dyer, and Manwood Justices, That if Executors grant, omnia bona sua, that the goods which they have as Executors doe not passe, which see 10 E. 4. 1. b. by Dauby; But the contrary to that was holden by Wray cheife Justice of the Kings Bench, and by Flouden, in Broadbridges case, P. 18 Eliz. and they desired the opinion of 10 E. 4. to be Law, for by such grant made by Executors, the goods of the Testator doe passe.

CCCLII. 19. Eliz. In the common Pleas.

Note. It was said by Dyer, and Manwood Justices, That if one be condemned in an action upon the case, or Trespass upon Nihil dicit, or Negligent, &c. And a Writ issueth forth to enquire of the Damages, and before the returne of it, the Defendant dyeth, that the Writ shall not abate, for the awarding of the laid Writ is a Judgement: And it was said by Manwood, In a Writ of Account, the Defendant is awarded to account, if the Defendant account, and be found in arrearages and dyeth, the Writ shall not abate, but Judgement shall be given that the Plaintiff shall recover, and the Executor shall be charged with the arrearages, and yet account doth not lye against them.

Abatement of
Writ.

Account.

CCCLIII. 19. Eliz.

CCCLIII. 19. Eliz. In the Kings Bench.

Adjudicato recover in Debt against B. wherenpon a fieri facias issued to the Sheriff of Devon. and the Defendant, seeing the writ of Execution in the Sheriffs hands, said to him, that he would pay the Debt recovered at Exeter such a day, to satisfie the Execution, at which day the Defendant paid the monie accordingly, and presently came an officer of the City of Exeter, and attached the monie in the Sheriffs hands, supposing the Attachment of Goods, after the monie is in the Sheriff's hands, is void, to be indebted so much to one C. in whose name he made the Attachment, and now on the behalf of the said A. a Certiorare was prayed to remove the Attachment hither, and it was therefore holden by the whole Court that the Attachment was void, and a Certiorare granted, and Wray said, If it can be proved by oath, that if the Defendant did procure, or was assenting to the said Attachment, that Proces of contempt should issue against him, and the Sheriff demanded of the Court what return he shoulde make, because the monies were attached in his hands, and taken from him by force, to which Wray answered, That the Sheriff ought to answer the monies to the Plaintiff, which were once in his hands by force of the Execution, and that it was his folly to suffer the monie to be taken from him by colour of the laid Attachment, and if the monie was taken by force, the Sheriff had his remedy by an Action of Trespass; for the Attachment was void, but the Sheriff at the Return of the writ, ought to answer for the monie.

CCCLIV. 19 Eliz. In the Common Pleas.

Tenant for life bargained and sold his Lands to A. and his Heirs, and afterwards levied a Fine to the Bargainer, Sur coulans de droit come ceo, &c. It was holden by the Court, that it was a forfeiture committed by the Bargainer, not by the Bargainor, who at the time of the Fine had nothing to forfeit, and it was said by Manhood Justice, That if Tenant for life be disseised, and takes a fine, or supra, of a stranger, it is a forfeiture and yet he in the Reversion hath but a right in Reversion; so that if Tenant for life be disseised, and the Disseisor commits Waste, he in the Reversion shall have an Action of Waste against Tenant for life, and if two Tenants for life be disseised by two, A. and B. and one of the Tenants for life doth release unto A. and the other Tenant for life doth reenter, he hath the Property in common with the other to whom the Release was made, and he hath revested the entire Reversion in him, in whom the Reversion was before, &c.

CCCLV. 20 Eliz. in the Common Pleas.

Bracebridges Case.

The Case was, Thomas Bracebridge seised of a Mannour in Fee, leases H.8. parcell of it to one Cartes for 21 years, and afterwards 35 H.8. leased the same to one Moore for 26 years to begin after the expiration of the former Lease, and afterwards 5 E.6. he enfeoffed Griffith and others, to the use of the Feoffees themselves, and their Heirs, upon condition, That if the Feoffees did not pay to the said Thomas Bracebridge 2000 l. within 35 dayes after, that then immediately after the said 35 dayes, the Feoffees

should stand seised of the said Mannour to the use of the said Thomas Bracebridge, and Joyce his wife for their lives, without impeachment of Waste, and afterwards to the use of T.B. their second son in Tail, with divers Remainders over, the Feoffees do not pay the said money within the said 15 days, afterwards Curties attorns to the Feoffees: it was noted, if the Reversion of the Lands, passed to Curties, passeth by the Feoffment of the Mannour without attornment, which see Littleton 133, 134. 2. If by the Attornment of Curties, after the 15 days, the uses can rise to Bracebridge and his wife, &c. and it was said, That the Case 20 H.6. Avowry 11.12. If a Mannour be granted for life, the remainder over in Fee, Tenant for life dieth, if the Tenants attorn to him in the remainder, the same is good, and if a Reversion be granted to two, and one of them dieth, attornment to the survivor is good; and if a Reversion be granted to Husband and Wife, in speciall Tail, the Wife afterwards dieth without issue, Attornment to the Husband is good, and if a Reversion be given in frank marriage, and afterwards the Husband and Wife are divorced, and afterwards the particular Tenant attorns to the Wife, the same is good, and by Manwood, If a man seised of a Mannour, the demesnes of which extends into two Counties, and hath issue a Son and a Daughter by one Woman, and a Son by another woman, and dieth, the eldest Son enters into the Demesnes in one County only, and takes the profit in one County only, and dieth without issue, the Daughter shall have, and inherit the Demesnes or Services, whereof her brother was seised, and the Son of the half blood the rest: and by Manwood, the attornment of Curties, who was the first Lessee, shall bind Moore the second Lessee, for he ought to attorn, against whom lieth the Quid Juris clamat: and if a Lease for years be made of a Mannor, and the Reversion of it be granted to another in fee, if the Lessee for years attorneth it shall bind the Tenants of the Mannor, 18 E.2. A man seised of a Mannor, in the right of his wife, leased parcell of it for years without his wife, the Reversion thereof is not parcell of the Mannor, contrary, if the Lease had been made by the Husband and Wife: And by Dyer, if Tenant in Tail of a Mannor leaseth parcell for years, and afterwards makes a feoffment of the whole Mannor, and makes Liberty in the Demesnes not leased, the Reversion of the Land leased doth not passe, for by the feoffment a wrong is done to the Lessor, which the Law shall not further enlarge than appeareth by the deed, contrary in case of Tenant in fee of a Mannor, and that without Deed with Attornment: and it was the Case of one Keller, 23 H.8. Keller was Cestoy que use before the Statute of 27 H.8. of divers Lands by sebe, ^{Keller's Case;} tail Conveyances, the use of some being raised upon Recovery, of some upon fine, and of some upon feoffment, and he made a feoffment of all these Lands by Deed, with a Letter of Attorney to make Liberty, the Attorney entered into part of the Land, and made Liberty in the name of the whole, it was agreed by all the Justices, That the Lands passed, notwithstanding in others possession, i. other Feoffees, and by Dyer, if the Tenants of a Mannor pay their rents to the Disseisor, they may refuse again to pay them, and if a Lease be made for years, the remainder for life, if the Lessor will want over his Reversion, the Lessee for years shall Attorn, and his attorn shall bind him in the remainder for life, and if a Lease be made to one for years, the remainder over for life, the remainder to the Lessee for years, in Fee. Now if the Lessee for years grant all his interest, &c. there needs no attornment: and if Grantee of a rent in fee leaseth it for life, and afterwards grants the Reversion to another, the Attornment of the Tenant is not requisite, but onely of the Grantee for life. It was also holden, That this Attornment by Curties two years after the Liberty was sufficient, for it shall have relation to the Liberty to make it parcell of the Mannor, but not to punish the Lessee for waste done mean between the Liberty and the Attornemant.

tornment, but betwixt the Feoffor and Feoffee it shall passe ab initio. It was holden, also That although the uses so limited are determined by the default of payment within the 15 dayes, yet the Feoffees shall take the Revision by this Attornement to the second uses, and if I enfeoff one upon condition to enfeoff J.S. who refuseth, now the Feoffee shall be seised to my use, but if the condition were to give in Tail, contrary: So here is a Limitation beyond the first use, which shall not be defeated for want of attornement to the first use, and here it was not the meaning of Bracebridge to have the Lands again upon breach of the condition in his former estate, but according to the second use, and Judgement was given in the principal case according to the resolutions of the Judges, as aforesaid, and it was said by Harper Justice, That if a Feoffment in Fee be made to J.S. upon condition that he shall grant to A. a rent-charge, who refuseth it, J.S. shall be seised to his own use.

CCCLVI. 20 Eliz. In the Common Pleas.

Scifin.

The Case was this, Lord and Tenant by service to pay every year such a quantity of salt, but since 10 H. 7. The Tenant hath always paid the monie for salt, the question was, If the Lord might resort to the first service, and if the monie be Heislin of the salt, and Maawood took this difference, i.e. where the Lord takes a certain sum of monie for the salt, the same is not any Heislin, for the service is altered, as at the first Scartage Tenure was a work to be done by labour, i.e. plowing, but now it is changed into a certain Rent, and the Lord cannot resort to have his plowing, and in Kent divers Tenants in ancient time have paid Barly for their Rent, but the same afterwards was paid in a certain sum of monie, so as now the Lord of Canterbury, who is Lord of such Tenements cannot now demand his Barly: &c. but if the sum which hath been used to be paid be uncertain in one year so much, and another year so much, according to the price of salt, then such a payment of monie is a sufficient Heislin of the salt, Quid sicut concession per Garum.

CCCLVII. 20 Eliz. In the Common Pleas.

Accomp by
the heir of a
Copyholder.
Custome.

Accomp, brought by an Heir Copy-holder, for the profits of his Copyhold Lands taken during his Sonage, the Defendant pleaded, That by the Custome of the said Honour, the Lord of the Honour might assign one to take the profits of a Copyhold descended to an Infant, during his Sonage to the use of the Assignee, without rendering an accompt, and the same was holden to be a good Custome, as a Rent Granted to one and his Heirs to render during the Sonage of every Heir, but admitting, that the Custome were void, yet this Action doth not lie, for the Defendant hath not entered and taken the profits, as Prochein amy, in which Case although he was not Prochein amy, &c. he is chargeable, as Prochein amy according to his Claim, but here he claimeth by the custome and grant of the Lord, and not in the right of the Heir, and therefore it was adjurged in this time of this Quare, that if one entred into Lands claiming by Devise, where in truth the Land devolved is entailed, he should not be charged in accompt, &c.

20 Eliz.

CCCLVIII. 20. Eliz. In the common Pleas.

NDt, It was holden by the whole Court, That the Statute of 32. & 34 H. 8. of Wills, did not extend to Lands in London, but that the devise of the whole is good: And if Houses in London parcell of the possessions of Abbes came to the Crowne by Dissolution, and he grants them over to hold in cheife by Knights service, these Lands are devisable: But it was holden, That the said Statutes as Acts executes, extended to Lands in London, and shall be good but for two parts: And if a man hath Lands in tail, and in fee-simple, which are of double the value of the Lands in tail, and deviseth all his Lands, all the Land in Fee-simple shall passe. Dyer. One seised of three Mannors, the one in Capite in Fee, and two in Socage in tail, and deviseth all his Land in Capite, it is good against the King for all Capite Land, and he shall be tyed to have the Lands in Socage, but it shall not bind the Heir: And a devise of the third part (where all is devised) is void as well against the Heir as against the King. And he said, That if a man be seised of twenty Acres in Socage, and ten Acres in Capite, and deviseth two parts of his Lands, it is reasonable to say, That all the Socage Lands shall passe, but if the devise was of two parts of all his Lands, is otherwise, for this word (All) implies that the two parts shall be, per my & per tout, as well Capite as Socage, i. e. It was argued by Fenner, That the Lands in London are now devisable as they were before the Statute, for if the Devise of Lands in London be disturbed, he shall have, Ex gravi Querela, o-
Custome of
London.
therwise it is of Lands at the common Law, and if an Assize of Mort-dancester be brought of Lands in London, it is a good Plea to say, That the Lands are devisable: but in an Assize of Mort-dancester of Lands at the common Law, it is not any Plea: And if a man gives Lands at the common Law, i. e. not devisable by the common Law, he cannot devise the Reversion, for the Statute shall not doe wrong to the person, i. e. to the Donee who there shall lose his acquittall: but of Lands devisable by custome, it is otherwise, and if Land in a Burrough was devisable for life by the Custom, and afterwards came the Statute of 23 H. 8. which made all Lands devisable, now that Land is devisable for life by the Custom, and the Reversion by the Statute.

CCCLIX. 20. Eliz. In the common Pleas.

In an Action of Wast, of Wast assigned in a Wood, the Jury viewed the Wood only without entring into it: And it was holden that the same was sufficient, for otherwise it shoulde be tedious for the Jury to have had the view of every stub of a Tree which had been felled: Yet Meade Justice said, That if Wast be assigned in severall corners of the Wood, then the Jury is to have the view of every corner, but contrary where Wast is assigned in the whole Wood: And if Wast be assigned in every Room of a House, the view of the House generally is sufficient. And Dyer Justice said, That if Wast be assigned in severall places, and of some of them the Jury had not the view, of that they may find, no Wast done.

29 Eliz. In the common Pleas.

CCCLX. Sir Thomas Lees Case.

It was holden, per curiam: That whereas Sir Thomas Lee was seised of a Mannor, and alien the Mannor except one close parcell of the said Mannor called Newdick, and there were two Closes parcell of the said Mannor called Newdick, the one containing nine Acres, and the other containing three Acres; That the Almee should not chose which of the said closes he would have: but the Almee or Feoffor should have the Election which of the said Closes should passe.

Election.

CCCLXI. 20. Eliz. In the common Pleas.

Tenant in tail, the Remainder in tail, &c. Tenant in tail, in possession, makes a Lease for three lives, according to the Statute of 22 H. 8. and afterwards dyeth without issue, he in the Remainder before any Entry leaveth a Fine, the same is good, for by the death of Tenant in tail without issue, the Free hold is vested in him in the Remainder in tail: And of that opinion was the whole Court.

Fines levied
by Tenant in
tail in Re-
mainder.

20. Eliz. in the common Pleas.

CCCLXII. Ferrand and Ramseys Case.

In an Execution servire brought of a House in London, the Defendant pleads, That long time before the Livery of the Plaintiff had any thing, &c. One Ann Ramsey was seised in Fee, and was seised, and that the same delivered to William Ramsey as Son and Heire to the said Ann, who was disseised by Isarel Owen, who leased to the Plaintiff, upon whom the said William Ramsey did re-enter: The Plaintiff Replicando, That the said Ann did not die seised, but, That before the Execution, one Robert Owen was seised and dyed seised, and from him descended the said House to Isarel Owen as Son and Heire of the said Robert, absque hoc, that the said Isarel did disseise the said Ann, upon which they were at issue, and at Nisi prius, in London it was given in Evidence of the Defendants part: That Crofton and Langhton were seised in Fee of the said Premise, and by Deed indented conveyed it to one John Ramsey, Robert Dakins, and four others and their Heirs, upon condition that they the said Feoffees their Heirs or Assignes should pay to the said Ann and her Heirs six pounds thirteen shillings and four pence: And also should enfeoff the said Ann, if to the same they were required by the said Ann in her life, or within four days next following such Request in Fee unto the use of the said Ann and her Heirs, cum & quando ad hoc per eandem Annam requisit, fuerint, and if the said Ann dyed before such Request, that then the said Feoffees or their Heirs should enfeoff such issues of the said Ann, or such other persons which the said Ann should name, cum & quando ad hoc per eandem Annam requisit, fuerint, or within four days after such Request the said Feoffees or their Heirs should be seised of the said House, to the use of the said Ann and her Heirs. Afterwards the seventh of April, 16 Eliz. Ann demanded of William Ramsey, Son and Heire of John Ramsey, six pounds thirteen shillings and four pence, being due to the said Ann, ut supra, the which sum the said William Ramsey did refuse to pay, by force of which, and by

the Statute of 27 H. 8. The said Ann Ramsey was thereof seised, and dyed seised, and from her descended the said House to William Ramsey: The Plaintiff confessed the Feoffment to Crofton and Langhton, to John Ramsey and others, and shewed further, That the said Ann required surviving feoffees to ente off one Robert Owen of the said House, who three dayes after made the Feoffment accordingly, Robert Owen enfeoffed John Owen, who dyed thereof seised, and from him the said House descended to Isarel Owen, Crafton dyed, Langhton having issue two Daughters, dyed: All the feoffees but one dyed, Ann the time aforesaid demanded the said six pounds thirteen shillings and four pence of the said William Ramsey in another House in London, but at the Feast of Saint Michael last before, who denied to pay it, the second Daughter of Langhton entered, and thereof enfeoffed the said Isarel Owen, who leased the same to the Plaintiff, and upon that Evidence the Defendant dis demur in Law: And first it was resolved by the whole Court, That the said summe to be paid to the said Ann was not a Rent but a summe in gross, because reserved to a Stranger, &c. Which see Litt. 79. And by Reversion, Mounson Justice, If the words of the reservation had been Twenty Nobles Rent, yet it had been but a summe in gross, but otherwise it had been by devise: Also there is not any condition for the payment of it, but only a Limitation for the word subsequent, which Limitis the future use, takes away all the force of the words of the Composition, as 27 H. 8. 24. Land given in fee upon condition that the Donee and his Heires shall carry the Standard of the Donee when he goes to battaille, and if he faille thereof, then the same to remaine to a stranger, the limiting of the Remainder hath taken away the conditions and hath controlled it, and now the condition is become a Limitation; But where the words subsequents are against Law, as if upon failure, that then it shall be lawfull for a Stranger to enter, &c. these words because they are against Law (for a Rent cannot be reserved to a stranger, &c.) do not so. Feoffments upon condition. Broke the Condition by Mead, contrary by Mounson, for the Condition is utterly gone. And by Mead, Feoffment in Fee upon condition, That if the Feoffee shall doe such a thing that he shall re-enter and retain the Land to the use of a stranger, the use is void, and the Feoffee shall hold the Land to his own use: A Feoffment in Fee upon condition, That the Feoffee shall marry my Daughter, and if he refuse to marry her, that then he shall be seised to the use of £ 5, the same is not a Condition, but a Limitation, and in all cases where, afterwards, of a Condition, an Interest is limited to a stranger, there it is not a Condition but a Limitation: And Meade said, That the said annuall summe is not demandable, but the party ought to pay it at his perill, Litt. 80. But by Mounson, it ought to be demanded, say so this word (Refuse) doth imply: And when at the Request of Ann the Feoffment is made, by Mounson, Meade, and Windham, the Rent is gon, but Dyer contra-ry, unlesse the Feoffment be made to Ann her selfe: And afterwards Judgment was given for the Plaintiff, Hill, 19 Eliz. Rot. 748. There was a Case betwixt Shaw and Norton. One Green devised his Lands to A, and devised also, the said A should pay a Rent to B, and that B might distraine for it, and if A faille of the payment of it, that the Heires of the Devisor might enter, the same is a good Distresse, and a good Condition. And by Mounson, Demand ought to be made of the Rent, for the words are (Refuse) which can not be without Demand or Request: As it was certified, That such a Clerk refused to pay his Tenthes, and because it was expiessly set downe in the certificate that he was requested, &c. for that cause he was discharged. And it was also holden, That if Request be necessary, that in this case, Request is to be made, That it ought to be made to the surviving Feoffee, or his heir, unlesse to the heirs of any of the feoffees who are dead,

Shaw and Nor-ton Case.

Hill 25. Eliz. In the Kings Bench.

CCCLXIII. Lacyes Case.

Indictments.

Commission
repealed.

Lacy was indicted of the death of a man upon Scarborough sands, in the County of York, between the high water-work, and the low water-work, and the same Indictment was removed into the Kings Bench, and being arraigned upon it, he shewed, that the said Indictment was shewed, by vertue of a Commission which issued the first day of May, directed to the Justices of Assize, and other Justices of the Peace in the said County, to enquire of all Murders, Felonies, &c. and pleaded further, That the second day of May alsoresaid, issued another Commission directed to the Lord Admirall and others upon the Statute of 28 H.8. cap. 15. by force of which the said Lacy was indicted of the same murder, whereof he was now arraigned, and the said last Commission was, ad inquirendam, tam super alcum mare, quam super litora maris, & ubique locorum infra jurisdictionem nostram maritimam: And that the said Indictment taken before the Admirall, was taken before this, upon which he was arraigned, and upon the whole matter prayed to be dismissed: And the opinion of all the Justices was, that the first Commission was repealed by the second, and so the Indictment upon which he was arraigned, taken, coram non Judice, 10 E. 4. 7. If a Commission for the Peace issuet into one County, and afterwards another Commission issuet to a Town within the same County and parcell of it, the first Commission is repealed, which Gaudy granted, if notice be given, &c. but Wray denied it; but by the whole Court, by this last Commission to the Lord Admirall, the first Commission, as to the Jurisdiction, in locis maritimis is determined and repealed; for these two Commissions, are in respect of two severall authorities, the first Commission merely by the Common Law, the other by the Statute aforesaid, and thereupon the party was discharged against the Queen, as to that Indictment. Note, that in the Argument of this Case, it was said by Coke, and agreed by Wray, That if a man be struck upon the high-sea, whereof he dieth in another County afterwards, that this murder is punishable, notwithstanding the Statute of 2 Ed. 6.

Past. 25 Eliz. In the Kings Bench.

CCCLXIV. The Queen and Braybrookes Case.

The Queen brought a writ of Error against Braybrook, The Cause was this; That King Ed. 4. was seised of the Maner of Marston, and gave the same to Lionel Lord Norris, and A. M. and the Heirs of the body of the Lord, the Remainder to H. Norris in Tail, L. and A. entermarrie, L suffered a common Recovery against himself only, without naming the said A. Hen. Norris is attainted of high Treason by Act of Parliament, and by the same Act all his Lands, Tenements, Hereditaments, Rights, Conditions, &c. the day of the Treason committed, or ever after, &c. Hen. Norris is executed, Lionel dieth without issue, the Queen satisfied the said Recovery for one moiety by Scire facias, because Anne who was joint tenant with Lionel who was not named, and party to the said Recovery: and afterwards the Queen granted to the Lord Norris, Son of the said Hen. Norris, Manerium suum de Merston, & omnia jura sua in eodem, and now upon the said Recovery, the Queen brought a writ of Error, and it was argued by Egerton the Queens Sollicitor, that this right to a writ of Error is such a right as is transferred to the Queen by the Act of Parliament, for the words are, omnia jura sua quocunque, and here is a right, although not a present right

right, yet a right althoough in futuro, so it is a right of some quality, as A, Tenant in Tail, the Remainder in Tail to B. A makes a Feofment in Fee, B. is attainted of high Treason, and by such Act all his Lands, &c. given to the King. A. dieth without issue, the Queen shall have a Formedon in the Remainder, and althoough the Queen hath granted to the Lord Norris, Manerium suum de Merston, & omnia jura in eodem, yet by such generall words, a Writ of Error doth not passe, which See 3 & H.8. br. Patents 98. And also this Action rests in privity of record, and cannot be displaced from thence, but by Act of Parliament, see Br. Chose in Action 14. 33 H.8. for when the King will grant a thing in Action, he ought in his Patent to recite all the circumstances of the matter, as the Right, and how it became a Right, and because the Queen here doth not make mention of this Right, as of the Entail, the Recovery, and the Attainder; for that cause the Right doth not passe. The Case betwixt Cromer and Cranmer, 8 Eliz. the Dissenter was attainted of Treason, the Queen granted to the Heir of the Dissenter all the Right which came unto her by the Attainder of his Ancestor, nothing passed Causa qua supra: And always where the King grants any thing, which he can, not grant, but as King, that such a grant without speciall words, is to no purpos. Coke contrary, he agreed the Case put by Egerton, for at the time of the Attainder, B had a Right of Remainder, but in our Case Hen. Norris had not any Right, but a possibility of a Right of Action, i.e. a Writ of Error; And he said that this writ of Error is not forfeitables for it is an Action which rests in privity, no more than a condition in grossesse, as a Feofment in Fee is made upon condition of the party of the Feoffor who is attainted ut supra: This word (Right) in the Act of Attainder shall not transfer this Condition to the Queen, and of the Act of Attainder to Hen. Norris, It is to be conceived That the makers of the Act did not intend, that by the word (Right) every Right of any manner, or quality whatsoever should passe so easie a Condition to the Queen, and therefore we ought to conceive, that the makers of the Act did not intend to touch Rights which rested in privity: and as to the Grant of the Queen, to the Lord Norris of the Manors of Merston, Et omnia jura sua in eodem, he conceived, that thereby the Right of the Writ of Error did passe; for it is not like Cranmers Case, but it in the said Case, the Land it self had been set down in the Grant, it had been good enough, as that Cranmer being set in Fee of the Manors of D was thereof dispossesed, and so being dispossesed was attainted of high Treason: now the Queen grants to his Heir to cum suis sicut in his Manors of D, &c. and so in our Case, the Queen hath granted to the Lord Norris, Manerium suum de Merston, & omnia jura sua in eodem, &c. at another day it was moved by Plowden, that this Right of Writ of Error was not transferred to the Queen by the Act, but such Right might be saved to a stranger, &c. the words of the Act are, omnia jura sua, and this word (sua) is Pronomen possessionis, by which it is to be conceived, that no Right should passe, but that which was a present Right, as a Right in possession, but this Right to a Writ of Error, was not in Hen. Norris at the time of his Attainder, but it was wholly in him against whom the erroneous Judgement was had: and therefore it in a Precept quod reddat, the Tenant pouche and loseth, and Judgement is given, and before Execution, the Tenant is attainted by Act of Parliament, by words ut supra, and afterwards he is pardoned, the Demandant standeth for Execution against the Tenant, now notwithstanding this Attainder, the Tenant may sue Execution against the Tounchee, and afterwards Wray clyef Justice openly declared in Court, the opinion of himself and all his companion Justices, and also of all the other Justices to be, That by this Act of Parliament, by which all Lands, Tenements, Hereditaments, and all Rights of any manner and quality whatsoever Hen. Norris had, the day of his attainder, or ever after, Lionel then being alive, and over-living the said Hen. Nor-

ris, that this Writ of Error was not transferred to the Queen: And that the said Act by the words aforesaid could not convey to the King this possibility of right, for at the time of the Attainder, the Right of the Writ of Error was in Lyonel and Hen. during the estate tail limited to Lyonell; had not to do with the Land, nor any matter concerning it: And Judgement was given accordingly; And it was holden, That he in the Reversion, or Remainder upon an Estate tail might have a Writ of Error by the common Law, upon a Recovery had against Tenant in tail, in Reversion.

CCCLXV. Mich. 25, & 26. Eliz. In the common Pleas.

Copy-holder.

AT Trespass brought by a Copy-holder against the Lord for cutting down Land carrying away his Trees, &c. It was found by speciall Verdict, That the place where, &c. was Customary lands of the Plaintiffs, holden of the Defendant, and that the Trees whereof, &c. were Cherry Trees, de-magnitudine sufficienti essendi maretium, and that the place where they growed, was neither Orchard, nor Garden: It was said by the Court, That by the Custome the Copy-holder could not cut down such Trees, but the Lord might, and that the cutting down of such Trees which were not waste, the Copy-holder might justifie without punishment: But because by the Verdict it did not appear that the Trees for which the Action was brought, were Timber in fact, but only, de magnitudine essendi maretium, the Plaintiff had Judgement.

Mich. 25, & 26. Eliz. in the Common Pleas.

CCCLXVI. The Lord Staffords Case.

Extent.

Upon Recovery in debt against the Lord Stafford, certain Lands of the Lord were extended by Elegit; The Queen because the Lord Stafford was indebted unto her, by Prerogative ousted the Tenant by Elegit: Fleetwood Serjeant moved the Court in the behalfe of him who recovered, and surmised to the Court that the Queen was satisfied, and therfore prayed a Re-extent, but the Court would not grant it, because they were not certain of the matter, but advised the party to sue a Scire facias against the said Lord Stafford, to know and shew cause, why a Re-extent should not issue sooth, the Queen being satisfied, &c.

Mich. 25. & 26. Eliz. In the Kings Bench.

CCCLXVII. Gibbs and Rowlies Case.

Thas.

Prohibition.

Symon Gibbs Parson of Beddington, Libelled in the Spirituall Court against Rowlie, for Lythe Pilke, Rowlie upon suuise of a Prescription, de modo Decimandi, obtained a Prohibition, which was against Symon Gibbs, Rectorem Ecclesie parochial de Nether Beddington, and the parties were at Issue upon the Prescription, and it was found for Rowlie. Egerton Solicitor moved against the Prohibition, because the Libell is against Gibbs, Rectorem Ecclesie paroch. de Beddington, and the Prohibition was de Nether Beddington, and it was not averred that Beddington in the Libell, and Nether Beddington, is unum & idem, & non diversa; It was said by the Court, That upon the matter there is not any Prohibition against Rectorem Ecclesie de Beddington

Beddington only, and therefore said to the Plaintiffs Councill, let the Parson proceed in the Spirituall Court at his perill.

Mich. 25. & 26. Eliz. In the Kings Bench.

CCCLXVIII. Russell and Handfords Case.

Russell brought an Action upon the Case against Handford, and declared, *Quod cum quoddam molendinum ab antiquo fuit erectum, upon such a River, de quo, one Thomas Russell whose Heir the Plaintiff is, was seised in his Demesne of Fee, and by thereof seised, after whose death the same descended to the Plaintiff, by force of which the Plaintiff was seised in his Demesne as of Fee, and so seised, The Defendant upon the same River had levied a new Mill, per quod cursus aquæ prædictæ coarctatus est, and upon that guilty, It was found for the Plaintiff: It was moved in Arrest of Judgement, That it is not layed in the Declaration, that his Mill had been a Mill time out of mind, &c. And then if it be not an ancient Mill time out of mind, &c. it was lawfull for the Defendant to erect a new Mill; And it was said, That these words (ab antiquo) are not fit or significant words to set forth a Prescription, but the words, A tempore cuius contraria memoria hominum non existat, are the usual words for such a purpose: See the Book of Entries 10, 11. See 11 H. 4. 200. If I have a Mill and another levies another Mill there, and the Miller hinders the Water to run to my Mill, or both any such nuisance, an Action lyeth without any Prescription, as it seems by the Book in 22 H. 6. 14. The Plaintiff declared, That he was Lord of such a Towne, and that he and all his Predecessors, Priors of N, Lords of the same Towne, have had, within the same Towne, four Mills time out of mind, &c. And that no other person had had any Mill in the said Town, but the Plaintiff and his Predecessors, the said four Mills, and that all the Tenants of the Plaintiff within the same Towne, and all other Tenants there, &c. ought, and time out of mind, &c. had used to grind at the said Mills of the Plaintiff, and that the Defendant, one of the Tenants of the Plaintiff, had erected and set up a Hoise Mill within the said Towne, and there the Tenants grinded, &c. And it was holden, That paradvnture upon such matter for an Action lyeth, because the Defendant being one of the Tenants of the Plaintiff is bound by the Custome and Prescription, so as he hath offended against the privy of the Custome and Prescription. And as to the Case in question, It was the opinion of all the Justices, That if the Mill whereof the Plaintiff hath declared, be not an Amercement Mill, that this Action doth not lie upon the matter, eo quod cursus aquæ coartatur: But yet at last, it was holden by the Court to be good enough, notwithstanding the Exception, another Exception was taken to the Declaration, because that here is set forth the seisin of the Father of the Plaintiff, and the Discent to the Plaintiff by force of which he was seised in his Demesne, &c. without shewing that after the death of the Father that he entered into the said Mill, &c. Seisin in fact, and in Law. So as no seisin in fact is alledged, but only a seisin in Law, and if the Plaintiff was not seised in fact, he cannot punish this personall wrong, but the Exception was disallowed, so such a seisin in Law is sufficient for the maintenance of this Action. And afterwards the Plaintiff had Judgement to recover his Damages. See for the Action it selfe contained in the Declaration. 8 Eliz. Dyer 248.*

Mich. 26. Eliz. In the Exchequer.

CCCLXIX. Cleypools Case.

Informations, upon the Statute of Eliz. setting forth, That the Defendant hath converted three hundred Acres of arable Lands of Village, to pasture, and the same conversion hath continued from 15 Eliz. unto the two and twentieth of Eliz: The Defendant as to the Conversion pleaded Not guilty, and as to the Continuance, the General pardon by Parliament, 23 Eliz. upon which the Attorney general did demur in Law, It was argued, That that pardon did not extend to the continuance of the said Conversion: And first the Barons were of clear opinion, That if A be seised of Arable Lands, and converts the same to pasture, and so converted, leaseth it to B, who continues it in pasture as he found it, he shall be charged by that Statute: And it is not any good Construction, where the Exception in the pardon is, excepting the converting of any Land from Village to Pasture, made, done, committed, or permitted, that the Conversion excepted out of the pardon shall be intended and construed the bare Act of Conversion, but the whole offence, i. the continuance and practise of it is understood: As if by generall pardon all intrusions are excepted, now by that, the instant Act of Intrusion, i. the bare Entry is not only excepted, but also the continuance of the Intrusion, and the perception of the profits: And note, The words of the Statute are (Conversion permitted) and Conversion continued is Conversion permitted: And the said Statute doth not punish the Conversion, but also the continuance of the Conversion, for the penalty is appointed for each year in which the Conversion continues: And Egerton Solicitor put this Case, 11 H. 8. It was enacted by 3 H. 7. cap. 11. That upon Recovery in Debt, if the Defendant in delay of Execution sues a Writ of Error, and the Judgment be affirmed, he shall pay damages, now the case was, That one in Execution brought such a Writ of Error, and the first Judgement is affirmed, he shall pay damages, and yet here is not any delay of the Execution, for the Defendant was in Execution before, but here is an Interruption of the Execution, and the Statute did intend the Execution it selfe, i. the continuance in Execution, ibidem moraturus quousque: It was said on the other side, That the conversion and continuance thereof are two severall things, each by it selfe, and so the conversion only being excepted in the pardon, the continuance thereof remaines in the grace of the pardon: And it appeareth by the Statute of 2, and 3. Ph. & Ma. That conversion, and continuance are not the same, but alia, atque, diversa, and distinct things in the consideration of the Law, for there it is enacted, That if any person shall have any Lands to be holden in Village according to the said Statute, but converted to Pasture by any other person, the Commissioners, &c. have authority by the said Statute to enjoin such persons to convert such Lands to Village againe, &c. And in all Cases in the Law, there is a great difference betwixt the beginning of a wrong, and the continuance of it: As if the Father leuyeth a Nuisance in his own Lands to the offence of another and dyeth: An Assize of Nuisance doth not lye against the Heir for the continuance of that wrong, but a Quod permittat, See F. N. B. 124, It was ad-

Mich. 26. Eliz. in the Kings Bench:

CCCLXX. Powley and Siers Case.

Powley brought Debt against Sier Executoz of the Will of A: The Defendant demanded Judgement of the Will, soz he said. That one B was Debtor Executoz of the said A, and that he said B did constitute the Defendant his Executoz, to the Will ought to be brought against the Defendant as Executoz of the Executoz, and not as immediate Executoz to the said A, the Plaintiff by Reply said, That the said B before any probate of the Will, or any Administration dyed, and so maintained his Will. Wray Justice was against the Will, soz although here be not any probate of the Will of A, or any other Administration, yet when B made his Will, and the Defendant his Executoz, the same is a good acceptance in Law of the Administration and execution of the first Will, for the Defendant might have an Action of Debt due to the first Testator: Gawdy and Ayliff Justices, The Will is good: *See Dyer, 23 Eliz. 372, against Wray.*

CCCLXXI. Paseb. 26 Eliz. In the Kings Bench.

The Case was: A leased of certain Lands, bargained and sold by Indenture all the Trees there growing, Habendum, succidendum, & exportandum, within twenty years after the date of the said Indenture, the twenty years expire: The Bargainee cuts down the Trees, A brought an Action of Trespass for cutting down the Trees: And by Wray Justice, The meers property of the Trees vests in the Bargainee, and the Limitation of time which cometh after is not to any purpose but to hasten the cutting of the Trees within a certain time, within which, if the Vendeer doth not cut them, she shoulde be punished as a Trespassor as to the Land, but not as to the Trees: Gawdy contrary; And that upon this Contract, a conditionall property vests in the Vendeer, which ought to be pursued according to the direction of the condition, and because the condition is broken, the property of the Trees is vested in A.

Bargaine and
Sale of Trees.

Paseb. 26 Eliz. In the Kings Bench.

CCCLXXII. Curriton, and Gadbarsys Case.

In an Action upon the Case, the Plaintiff declared, That the Defendant in consideration that the Plaintiff should make a lease for life to the Defendant of certain Lands, Habendum after the death of A, before the tenth of August next following, promised to pay to the Plaintiff ten pounds, the first day of May next after the promise which was before the tenth of August: And the truth was, That the said ten pounds was not paid at the day, or sopra, nor the said Lease made: And now both sides being in default, the Plaintiff brought the Action, It was said by Wray Justice, If the Plaintiff had made the Lease according to the consideration, and in performance thereof the action would have lyen, but now his own default had barred him of the Action: But for another cause, the Declaration was holden insufficient, for here is not any Consideration, for the promise is, in consideration that the Plaintiff shall lease to the Defendant for life, Habendum after the death of A, which cannot be good by way of lease, but ought to enure by way of grant of the Reversion, so as here is no lease, therefore no consideration, and notwithstanding

that if a Lease be made for life, Habendum after the death of A, the Habendum is void, and the Lease shall be in possession according to the Premises, yet the Law will not give such construction to the words of a Promise, Contract, or Assumption, but all the words ought to be wholly respected according to the Letter, so as because that no lease can be made according to the words of the Consideration, no supply thereof shall be by any favorable construction: And so it was adjudged: But before the same imperfection was espied, Judgment was entered, and therefore, the Court awarded that there should be a lesser execution entered upon the Roll, for it is hard as it was said by Wray to have the party to a writ of Error in Parliament, because Parliaments are not now so frequently holden as they have used to be holden, and the Execution was laid accordingly.

Pascb. 26 Eliz. In the Kings Bench.

CCCLXXIII. Willis and Crosbys Case.

Error.

Amercement.

In a writ of Error, It was assigned for Error, That whereas in the first Action, the parties were at Issue, and upon the Venire facias one Gregory Tompson was returned; But upon the Habeas Corpora, George Tompson was returned, and the Jury was taken, and found for the Plaintiff, and Judgment given accordingly; It was argued on the part of the Plaintiff in the first Action, that the same is a thing amendable: As 9 E. 4. 14. A Jury was impanelled by the name of I B, and in the Habeas Corpora, he was named W B, and by such name sworn, &c. And upon Examination of the Sheriff, it was found that he was the same person who was impanelled, and it was amended and made according to the Pannell; But the opinion of the whole Court was, That as this case is it was not amendable, and it is not like to the case of 9 E. 4. For there the Examination was before the Verdict when the Sheriff was in Court, but here it is after Verdict, and the Sheriff is out of Court, and cannot be examined, and for these causes, the Judgment was reversed.

Pascb. 26. Eliz. In the Exchequer.

CCCLXXIV. Ognell and the Sheriffs of Londons Case.

Escape.

Ognell brought Debt upon an Escape by Bill in the Exchequer against the Sheriffs of London, the Case was, That one Crofts was bound to the now Plaintiff in a Recognisance, and afterwards committed for Felony to the Prison of Newgate, of which he was attainted, and remained in Prison in the custody of the Sheriffs: Afterwards Ognell sued a Scire facias upon the said Recognisance against Crofts, the Sheriffs returned, Capi, and the several matter aforesaid, and after Judgment given against Crofts for Ognell, Crofts got his pardon, and escaped: It was argued, That notwithstanding this Attainder, Crofts is subject to the Execution obtained upon the Recognisance: See the case of escape betwixt Maunser and Annesley, 16 Eliz. in Bendloes case, 2 E. 4. 1. It is said by Watman, That a man outlawed for Felony shall answer, but shall not be answered: See 6 E. 4. 4, One condemned in Reddissin, was taken by a Capias pro fine, and committed to Prison, and afterwards outlawed of Felony, the King pardons the felony, yet he shall remain in Execution, for the party if he will; But if the party be once in Execution for the party, & then outlawed of Felony, it seems by 6 E. 4. Fitz. Execution, 13. that the Execution is gone. And all the Barons were clear of opin-

In in the principall case for the Plaintiff. And they also said, That if one who hath a Protection from the King, be taken in Execution, & Escape, the Gaoler Hales case. shall answer for the Escape, and that was one Hales Case, And afterwards Judgment was given for the Plaintiff, and one of the causes of the Judgment was, because, That the Sheriffs had returned, Capi. upon the Proces.

Hill. 25. Eliz. In the Kings Bench.

CCCLXXV. Bishop and Redmans Case.

Bishop, a Doctor of the Civill Law brought an Action of Covenant against Redman Archdeacon of Canterbury, and declared upon an Indenture, by which the Defendant did constitute the Plaintiff Officialeum suam of his Archdeaconry for three years, and gave to him by the said Indenture, authoritatem admittendi, & inducendi quoscunque Clericos ad quecunque beneficia Ecclesiastica infra Archidiaconatum predict. and also Probate of Wills, and further granted to him omnem & omnimodam Archidiaconatum jurisdictionem suam predict. absque impecitione, denegatione, restrictione, &c. after which Doctor Young was created Bishop of Rochester, which is in the Jurisdiction of the said Archdeaconry, and the Defendant took upon him to enthronize the said Bishop in his said Church, and took of him for his fee twenty Nobles, whereupon the Plaintiff brought this Action, it was moved for the Defendant, that upon the matter the Action doth not lie; for the Office of enthronizing or installing of a Bishop doth not pass by the said Indenture, nor is there any word in the Indenture, that doth extend unto it, for the Bishop is not a Clark, and the Plaintiff by the Indenture hath not to do but with clerks, not with Bishops, and it appeareth by the Grant of Subsidies, by the Clergy in Parliament, that a Bishop and a Clark are distinct things, See Instrumentum heretof. Prelatus et Clericus, &c. Also the Plaintiff hath not to do with a Bishoprick, but with Benefices, and a Bishoprick is not a Benefice, but a higher thing: And further the Plaintiff hath power to admit and induct, which doth not extend to installing, or enthronization, for that belongs to a Bishop, and the Court was clear of opinion, That by this Grant there did not passe any power to install or enthronize Bishops; and the generall words, i.e. omnem & omnimodam jurisdictionem Archidiaconatum predictam, did not mend the matter, for the word (predictam) doth restrain the words omnem, & omnimodam, &c. but admitting that; It was moved, If upon this Indenture Covenant lieth, for there is not any expresse Covenant, yet the words absque impecitione, denegatione, &c. do amount to so much, to make the Defendant subject to his Action, if the matter in it self would have served for him, and so was the opinion of the Court.

Hill. 26 Eliz. In the Kings Bench.

CCCLXXVI. Lady Lodges Case.

The Lady Laxton of London by her will bequeathed to Matthew Luddington, and Andrew Luddington, severall Legacies in monies to be paid to them respectively at their severall ages, &c. and made the Lady Lodge her Daughter her Executrix and died, Andrew died before his full age, Matthew took Letters of Administration of the goods of Andrew, and sued the Lady Lodge in the Spirituall Court for the Legacy bequeathed to Andrew; before which

which Suit begins, the Lady Lodge, with Sir Thomas her Husband gave all the goods which she had as Executrix of the said Lady Laxton to Sir William Coxell, Dr. of the Rolls, and to William Lodge. Sonne of the said Sir Thomas and his Lady, depending which Suit the Lady Lodge died, after which sentence was given against her being dead, and now a Citation issued out of the Spirituall Court against William Lodge Executrix of the said Lady Lodge, to shew cause why the sentence given against the said Lady Lodge, should not be put in Execution against him, and sentence was given against the said William Lodge who appealed to the Delegates, and there the sentence was affirmed. And now came William Lodge into the Kings Bench, and set forth the grant of the said Lady Lodge as aforesaid, and that the same was not examinable in the Spirituall Court, and therupon prayed a Prohibition: And Awbrey Doctor of the Civill Law, came into Court to informe the Justices, what their Law was in certain points touching the Case in question; and as to the sentence given against the Lady Lodge, after her death he said, That if the Defendant dyed before Issue joyned, which is called Litis contestationem, the suit shall cease, but if he dyeth after, Litis contestationem, it is otherwise, soz in such case the suit shall proceed, soz after Litis contestationem, the right of the suit is so vested in the Proctor, that he is a person suable untill the end of the suit: And also he reported thir Law to be, That if a Legacy be bequeathed to an Infant to be paid when he shall come to the age of twenty one years, if such a Legatorie dyeth before such age, yet the Executor or Administratoe of such Legatorie, shall sue for the said Legacy presently, and shall not expect untill the time, in which if the Infant had continued in life, he had attainted his full age. And as to the Prohibition it was argued by Egerton Solicitor Generall, That the grant aforesaid is not tryable in the Spirituall Court: As if the said Lady Lodge had suffered a Recovery to be had against her as Executrix by Cobin, &c. the same is not examinable in the Spirituall Court, but belongs to temporall Consuls, and therfore he prayed a Prohibition: But on the other side it was said, That if the Prohibition be allowed, the Legatorie hath no remedy, but that was denied, for the party might sue in the Chancery: And after the Prohibition granted, the Court awarded a speciall consultation, quatenus non extendat ultra manus Executoris, & quatenus non agitur de validitate facti, i. the grant aforesaid.

Hill. 28 Eliz. In the Kings Bench.

CCCLXXVII. Huddy, and Fishers Case.

Debt.

Attaint.

DEbt was brought upon a Bond, the Condition of which was for the performance of Covenants, Grants and Agreements in an Indenture: And in the Indenture it was recited, That in consideration that the said Huddy should build a Mill upon the Land demised by the Defendant to the Plaintiff by the same Indenture, and a Water-course by the Land demised, the Defendant leased the said Land to the Plaintiff, and the Lease was by the words Dedi & concessi: And the Plaintiff assigned the breach of the said Covenant in Law, in that the Defendant had stopped the said Water-course so made by the Plaintiff, upon which they were at issue, and it was found for the Plaintiff, upon which the Defendant brought Attaint, and the false oath was found, and it was moved in arrest of Judgment. That here is no Issue, and then by consequence no Verdict, and then no false oath, and then no cause of Attaint, for here the Issue is taken upon the stopping of the Water-course, which upon the shewing of the party is not any cause of action, for in the Indenture there is not any express Covenant, Clause, or Agreement,

ment, that the Lessee shold enjoy the Water course so to be made, only there is a Covenant in Law rising upon these words, Dedi & concessi, which can not extend to a thing not in esse at the time of the making of the Indenture, i. Coke who argued for the Defendants in the Attaint resembled this case, to the case in 23 E. 3. Carr. 77. Where it is holden, that the warranty knit to the Manors shall not extend to the Tenancy escheated: Anv 30 E. 3. 14. The Recovery in value shall not be in larger proportion then the Land im- tanted was at the time of the warranty made: So in our case, this Coven- ant shall not extend to any thing which was not in esse at the time of the Covenant made: And see 25. Ass. 2. where the Court shall reject a Verdict w^t part of a Verdict, &c. And because the now Plaintiff might after the Ver- dict, have alledged the same in arrest of Judgement which he did not, he shall not be helped by Attaint, but it shall be accounted his folly, that he would not sue his own case, and to avoid circuit of Action shew the matter in Stay of Judgement: As 9 H. 6. 12. by Littleton: If a man be Endured of Felony, if the Judgement be insufficient, but he takes not advantage of it, but pleads the generall Issue, and is acquitted, he shall never after have a Writ of Conspiracy, &c. And for another cause Judgement ought not to be given in this Case, because it doth not appear that Execution hath been sued, and then here is no party grieved; And then this Action being conceived upon the Statute of 23 H. 8. Cap. 3. which gives it to the party grieved, doth not lye, w^t a party grieved cannot be intended without Execution sued: See 21 H. 6. 55. by Paston; False oath, Judgment, and Execution doe entitle the par- ty grieved to Attaint. And see the Statute of 23 H. 8. Chancery, That the par- ty shall be restored to as much as he hath lost, therefore he ought to lose (by Execution) before he be a person able to bring this Action: But as to that matter, see the Statute of 1 E. 3. 6. by which it is Enacted, That the Ju- dge shall not leave to take Attaint for the damages not paid, so as before the said Statute no Attaint lay before Execution, 33 H. 6. 21. by Prisoit 5. H. 7. 22. c. E. 1. Attaint, 70. 8. E. 2. Assize, 395. And it was moved, That by another cause the Attaint doth not lye, as it is pursued in Proces upon it, by the Plaintiff hath not pursued the Statute, upon which the Attaint is grounded, for the said Statute gives speciall Proces in this Case against the Petit Jury, Grand Jury, and the party, viz. Summons, Re-summons, and Distresse infinite, but in this Case the Plaintiff hath sued otherwise, which is against the direction of the Statute: And that was taken to be a materiall Exception by Clench and Gawdy Justices, so; the Verdict doth not lye the matter of Proces in this Case by the Statute of 18 Eliz. which doth not extend to proceedings in penall Causes; which see, by the words of the Sta- tute, by an expresse Proviso: But Quare, If it be a penall Statute, because a lesser punishment is enacted by it, then that which was before inflicted upon such offenders: And as to the matter of Execution, Quare, If the Plaintiff be not pars gravata in hoc only, That he is subject to the said Judgment, and so liable to Execution.

Hil 28 Eliz. In the Kings Bench.

CCCLXXVIII. Penruddock and Newmans Case.

In an Ejactione firmæ, the Plaintiff declared upon a lease made by the Lord Morley, and, upon Not guilty pleaded, this speciall matter was found, That William Lord Mountegle, seised of the Manors of D, whereas, &c. became bounden in a Statute in such a summe to A, who dyed, the Executors of A sued Execution against the said Lord, i. upon the Extendi facias, a Liberete issued sooth, upon which the said Manors was delivered to the said Executrix,

Erectors, but was not returned. It was further found, That the said Erectors being so possessed of the said Manno, the said Lord commanded a Comt Baron to be holden there, which was holden accordingly by the sufferance of the Erectors, and the said Erectors were also present, at which time the Erectors in the presence of the said Lord, said these words, viz. We have nothing to do with this Manno; And upon this Verdit, two things were moved; If because the Liberale was not returned, the Execution was good: And as to that diverse Books were cited, 21 H. 6. 8. 18 E. 3. 25. And it was said that there was a difference, betwixt a Liberale, and a Capias ad Satisfaciendum, and Fieri facias, for these writs are conditionall, Ita quod Habeas Corpus, &c. Ita, quod habeas denarios hic in Curia, 3 H. 7. 3. 16 H. 7. 14. But contrary in the writ of Liberale, Habere facias scismam, for in such writs there is not such clause, and therefore if such writs be not returned, the Execution done by virtue of them is good enough: And see 11 H. 4. 12. If the Sheriff by force of an Elegit delivers to the party the moerty of the Land of the Defendant, and doth not returne the writ, if now the Plaintiff will bring an Action of Debt, de Novo, the Defendant may plead in Bar the Execution aforesaid, although the writ of execution were not returned, and yet the execution is not upon Record: And see the case there put by Hangford: And it is not like to the case of partition made by the Sheriff, the same ought to be returned, because that after the returne thereof, a new and Secondary Judgment is to be giben, i. Quod partio predicta firma & stabilis maneat, in perpetuum, firma & stabilis in perpetuum teneatur, see the Book of Entries, 114. And Egerton Solicitor, cited a case lately adjudged betwixt the Earle of Leicester, and the Widoof Tanfeild, That such execution without returne was good enough. Another matter was moved: Admit, That here be a good execution, if now the Erectors being in possession of the said Manno by force of that Execution, and permitting and suffering the Connutor to hold a Court there in the Manno house, and saying in his presence the words aforesaid, if the same doth amount to a Surrender by the Erectors to the said Connutor or not. And Wray cheif Justices saij, That here upon this matter is not any Surrender, for here the words are not addressed to the said Connutor who is capable of a Surrender, nor to any person certain: And it is not like to the case of 40 E. 3. 23, 24. Chamberlains Assiz, where Tenant for life saith to him in the Reversion, That his will is that he enter, the same is a good Surrender, for there is a person certain who can take it, but contrary in this Case, for here it is but a generall speech: It was adjourned.

Pasch. 28 Eliz. in the Common Pleas.

CCCLXXIX. Baskerville and the Bishop of Herefords Case.

Quare Impedit.

In a Quare Impedit by Walter Baskerville, against the Bishop of Hereford, &c. The Plaintiff counted, That Sir Nicholas Arnold was seised of the Aduowson as in grossse, and granted the same to the said Baskerville and others, to the use of himselfe for life, and afterwards to the use of Richard Arnold his Son in tail, Proviso, that if the said Nicholas dye, the said Richard being within age of twenty three years, that then the Grantees and their Heirs shall be seised to them and their Heirs untill the said Richard hath accomplished the said age: Nicholas dyeth, Richard being of the age of fourteen years, by force of which the Grantees were possessed of the said Aduowson, and afterwards the Church became void, and so it belonged to them to present: And Exception was taken to the Count because the Plaintiff had not averred the

life of Richard upon whose life the Interest of the Plaintiffs doth depend, Averment. And Gawdy Serjeant, likened it to the Case of the Parson which hath been adjudged, That where the Lessee of a Parson brought an Ejectione firmæ, and it was found for him, and in arrest of Judgment exception was taken to the Declaration, because that the life of the Parson was not averred, and soz that cause Judgment was stayed: Anderson their Justice: Upon the dying of Sir Nicholas Rich being but of the age of fourteen years, an absolute Interest for nine years not determinable upon the death of Richard, or rather, they are seised in fee determinable upon the coming of Richard to the age of twenty three years: Rhodes and Windham contrary: That here is an Interest in the Grantees determinable upon the death of Richard within the Term, for if Richard dieth without issue within the Term, the Remainder is limited over to a stranger: And as to the Exception to the Count: It was argued by Puckering Serjeant, that the Count was good enough, for although the life of Richard be not expressly averred, yet such a verment is strongly implied and so supplied: For the Count is, That dictus Nicholas obiit dicto Ric. being of the age of fourteen years, & non amplius, by force of which the Plaintiff was possessed of the said Advowson, quo quidem sic possessionato existente, the Church became void, and possessed he could not be, if the said Richard had not been then alive, and the same is as strong as an Averment: See 10 E. 4. 18. In Trespass for breaking his close, the Defendant pleads, That A was seised, and did enfeoff him, to which the Plaintiff saith, That long time before A had any thing, B was seised and leased to the said A at will who enfeoffed the Defendant, upon which B did re-enter, and leased to the Plaintiff at will, by force of which he was possessed untill the Plaintiff did the Trespass, and the same was allowed to be a good Replication, without averring the life of B who leased to the Plaintiff at will, for that is implied by the words, i. virtute cuius, the Plaintiff was possessed, untill the Defendant did the Trespass: And see also, 10 H. 7. 12. In an Assize of common, The plaintiff makes title, that he was seised of a Heslauge, and of a Carve of Land, to which he and all those whose estate, &c. have had common Appendant, &c. And doth not say, that he is now seised of the Heslauge: But this exception was disallowed by the Court, for scitum shall be intended to continue untill the contrary be shewed: It was adjoined.

Pasch. 28. Eliz. In the Exchequer.

CCCLXXX Carys Case.

¶ An Information in the Exchequer, by the Queen against Cary, the Case was this; A man grants scitum rectorum cum decimis eidem pertinent. Habend, scitum predictum, cum suis pertinentijs, for twenty years, the first Grantee dyeth within the Term, If now because the Tythes are not expressly named in the Habendum, the Grantee shall have them for life only, was the question: It was moved by Popham Attorney General, That the Grantee had the Tythes but for life, and to that purpose he cited a Case adjudged, 6 Eliz. in the common Pleas: A man grants black Acre and white Acre, Habendum black Acre for life, nothing of white Acre shall pass but at will, and in the argument of that case, Anthony Browne put this case; Queen Mary granted to Rochester such severall Offices, and shewed them specially, Habendum two of them, and shewed which certain, for soþt years, It was adjudged that the two Offices which were not mentioned in the Habendum, were to Rochester but for his life, and determined by his death: And so he said, in this Case, The Tythes not mentioned in the Habendum, shall be to

the Grantee for life, and then he dying, his Executors taking the Tythes are
Interveners: But as to that, It was said by Manwood theif Baron, That
the cases are not alike, for the Grantees in the cases cited are severall, intire,
dissinate things, which doe not depende the one upon the other, but are in gross
by themselves: But in our Cases, The Tythes are parcell of the Rectory,
and therefore say the nearnesse betwixt them, i. the Rectory and the Tythes,
the Tythes upon the mattter passe together with the scite of the Rectory for
the Termme of twenty years, and Judgement was afterwards given accord-
ingly.

Pascb. 26 Eliz. In the common Pleas, Mich. 27 & 28 Rot. 243.

CCCLXXXI. The Lord Darcy and Sharpes Case.

Debt. Rasure of Deeds. Costs, where damages are given.

Tomas Lord Darcy, Executor of John Lord Darcy, brought Debt upon a Bond against Sharpe, who pleaded that the Condition of the Bond was, That if the said Sharpe did performe all the Covenants, &c. contained with in a paier of Indentures, &c. By which Indentures the said John Lord Darcy had sold to the said Sharpe certian Trees growing, &c. And by the same Indentures Sharpe had covenantant to cut downe the said Trees before the benth of August, 1684. and shewed further, That after the sealing and delivery of the said Indenture, the said Lord Darcy now Plaintiff, caused and procured ISS to raze the Indenture, quod penes predict. Querentem reman-
bat, and of 1684. to make it, 1685. & so the said Indenture became void; And the opinion of the whole Court was clear against the Defendant, so; the raze
is in a place not material, and also the raze trencheth to the advantage of the Defendant himselfe who pleads it, and if the Indenture had become void by the raze, the Obligation had been single and without Deseriance.

Pascb. 28 Eliz. In the common Pleas.

CCCLXXXII. Rollston and Chambers Case.

Rollston brought an Action of Trespass upon the Statute of 8 H. 6. & forcible Entry against Chambers, and upon Issue joyned it was found for the Plaintiff, and Damages asselld by the Jury, and costs of suit all, and costs also, de incremento, were adjudged; And all were trebled in the Judgement, with this purclose, quo quidem damna in toto se attingant, &c. And all by the name of Damages: It was objected against this Judg-
ment, That where damages are trebled, no costs shall be given, as in Stat.
&c. But it was clearly agreed by the whole Court, That not only the costs asselld by the Jury, but also those which were adjudged, de incremento,
should be trebled, and so were all the Presidents, as was affirmed by all the Preignothorizes, and so are many Books, 19 H. 6. 32. 14 H. 6. 13. 22 H. 6. 57. 12 E. 4. 1. And Book Entries, 334. and Judgment was given accord-
ingly: And in this case it was agreed by all the Justices, That the party
convict of the force at the suit of the party should be fined notwithstanding
that he was fined before upon Enbishment for the same force.

Hill. 29. Eliz. In the common Pleas. *Instrat. Trin. 27 Eliz.*
Rot. 1606.

CCCLXXXIII. Jennor and Hardies Case.

The Case was, Lands were devised to one Edyth for life, upon condition that she should not marry, and if she dyed, or married, that then the Land should remaine to A in tail, and if A dyed without Issue of his body in the life of Edyth, that then the Land should remain to the said Edyth to dispose thereof at her pleasure: And if the said A did survive the said Edyth, that then the Lands should be divided betwixt the Sisters of the Devisee, A dying without Issue living Edyth. Shuttleworth Serjeant: Edyth hath but for life, and yet he granted, That if Lands be devised to one to dispose at his will and pleasure without more saying. That the Devisee hath a Fee simple, but otherwise it is, when those words are qualified and restrained by speciall Limitation: As 15 H. 7. 12. A man deviseth, That A shall have his Lands in perpetuum, during his life, he hath but an estate for life, for the words (during his life) do abridge the Interest given before: And 22 Eliz. one deviseth Lands to another for life, to dispose at his will and pleasure, he hath but an estate for life: And these words, (If A dyeth without Issue in the life of Edyth, That then the Lands should remain to Edyth to dispose at her pleasure) shall not be construed to give to Edyth a fee simple, but to discharge the particular estate of the danger, penalty, and losse, which after might come by her marriage, so as now it is in her libertie: And also he said, That by the Limitation of the latter Remainder, i. That the Lands should be divided betwixt the Daughters of his Sister, the meaning of the Devisee was not, that Edyth should have a Fee simple, for the Remainder is not limited to her Heirs, &c. if A dyeth in the life of the said Edyth, for the Devisee goeth further, That if A overlives Edyth, and afterwards dyeth without Issue, that the said Land should be divided, &c. Walmsley contrary: And he relied much upon the words of the Limitations of the Remainder to Edyth, Quod integra remaneat dicta Edyth, and that she might dispose thereof at her pleasure, for the said division is limited to be upon a Contingent, i. if A survive Edyth, but if Edyth survive A, then his intent is not that the Lands should be divided, &c. but that they shall wholly remain to Edyth, which was granted by the whole Court, and the Justices did rely much upon the same reason; And they were very clear of opinion, That by those words Edyth had a Fee simple; And Judgement was given accordingly. Anderson conceived, That it was a Condition, but although that it be a Condition, so as it may be doubted, if a Remainder might be limited upon a Condition, yet this devise is as good as a new devise in Reversion upon the precedent Condition, and not as a Remainder, quod Windham concessit, but Periam was very strong of opinion, That it is a Limitation: Two Joynl-tenants of a Term, A and B; A grants his part to B, nothing passeth by it, for, 's a grant, it cannot be good, for as one Joynl-tenant cannot enfeoff his Companion, no more can he best any thing in him by grant, for he cannot grant to him a thing which he hath before; for Joynl-tenants are seised and possessed of the whole, all which was granted, per Curiam, and Anderson said, That if Lands be granted to A and B, and the Heirs of A, B cannot surrender to A, for a Surrender is as it were a grant; And as a Release it cannot enure, for a Release of a Right in Chattell cannot be without a Deed.

Hill. 29 Eliz. In the common Pleas.

CCCLXXXIV. Hollingshed and Kings Case.

Debt.

Hollingshed brought Debt against King, and declared, That King was bound to him in a Recognizance of two hundred pounds before the Mayor and Aldermen of London, in interior Camera de Guildhall London, upon which Recognizance she said Hollingshed heretofore brought a Scire facias before the said Mayor, &c., in exteriori camera, and there had Judgment recovered upon which Recovery he hath brought this Action, and upon this Declaration, the Defendant did demur in Law, because that in setting forth of the Recognizance he hath not alleagued, That the Mayor of London hath Authority by Prescription or Grant to take Recognizances, and if he hath not, then is the Recognizance taken, Coram non Judice, and so void: And as to the Statute of West. 2. cap. 49. It cannot be taken to extend to Recognizances taken in London, which see by the words, De his quæ recordat, sive coram cancellario Domini Regis & ejus justiciarijs qui recordum habent, & in rotulis eorum irrrolatur, &c. And also at the time of the making of that Statute, London had not any Sheriffs, but Bayliffs, and the said Statute ordains that Pyses shall goe to Sheriffs, &c. But the whole Court was clear of a contrary opinion, for they said, Wee will know that those of London have a Court of Record, and every Court of Record hath an authority incident to it to take Recognizances, for all things which concerne the Jurisdiction of the said Court, and which arise by reason of matters there depending. Another matter was objected, for that, The Recognizance was taken in interiori camera, but the Court was holden in exteriori camera, and therefore not pursuant: But as to that, It was said by the Lord Anderson, That admit that the Recognizance was not well taken, yet because that in the Scire facias upon it, the Defendant did not take advantage thererof, he shall be bounden by his said admittance of it, as if one sue forth a Scire facias as upon a Recognizance, whereas in truth there is not any Recognizance, and the party pleads admitting such Record, and thereupon Judgment is given against him, it is not void, but voidable. Fleetwood Recorder of London, alleges many Cases to prove that the Courts of the King are bound to take notice, That they of London have a Court of Record, for if a Quo warranto issues to Justices in Eyre, it behoves not them of London to claime their Liberties, for all Courts of the King, are to take notice of them: And at the last after many motions, the opinion of the Court was for the Plaintiff: And it was said by Anderson, and in a manner agreed by the whole Court, That if pending this Demurrer here, the Judgment in London upon the Scire facias be reversed, yet the Court here must proceed, and not take notice of the said Reversall.

Priviledges of
London.

Hill. 29 Eliz. In the common Pleas.

CCCLXXXV. Bedingfeild and Bedingfeilds Case.

Dower.

Dower was brought by Anne Bedingfeild against Thomas Bedingfeild, The Tenant out of the Chancery purchased a Writ, de circumspecte agatis, setting forth this matter, That it was found by Office in the County of Norfolke, that the Husband of the Demandant was seised of the Mann of N, in the said County, and held the same of the Queen by Knights service in

in cheif, and thereof dyed seised, the Tenant being his Son and Heire of full age, by reason whereof the Queen seised as well the said Manors as other Manors, and because the Queen was to restore the Tenements, cum integre, &c. as they come to her hands, it was commanded the Judges to surcease, ^{Primer seisin} Domina regina inconsulta: It was resolved, per Curiam, That although the Queen be entituled to have Primer seisin of all the Lands, whereof the Husband of the Demandant dyed seised, yet this will did not extend unto any Manors not found in the Office, for by the Law, the Queen cannot seise more Lands then those which are contained in the Office: And therefore as to the Land not found by the Office, the Court gave day to the Tenant to plead in cheif: And it was argued by Serjeant Gawdy for the Tenant, That the Demandant ought to sue in the Chancery, because that the Queen is seised, to have her Primer seisin, and cited the case of 11 R. 2. and 11 H. 4. 193. And after many motions, It was clearly agreed by the Court, That the Tenant ought to answer over, for the Statute, De Bigamis Cap. 3. prohibes that in such case, The Justices shall proceed notwithstanding such seisin of the King, and where the King grants the custody of the Tenant himselfe, 1 H. 7. 18. 19. 4 H. 7. 1. A Mulco fortiori against the Heire him selfe where he is of full age, notwithstanding the possession of the King for his Primer seisin, by the Statute of Bigamis after the Heire was of full age, the Wife could not be endowed in the Chancery: But now by the Pergative of the King, such wives may be endowed there, Si vidue illae voluerint, and after many motions, The Court awarded, That the Tenant should plead in cheif, at his peril for the Demandant might sue at the common Law if shee pleased.

CCCLXXXVI. Hill. 28. Eliz. In the common Pleas

The Case was, The Husband was seised of Lands in the right of his Wife, the Husband and his Wife both joyned in exchange of the Lands with a stranger for other Lands, which exchange was executed, the Husband and the Wife seised of the Lands taken in exchange, altened the same by Fine, It was holden by Rhodes and Windham Justices, That the Wife after the death of her Husband might enter into her own Lands notwithstanding that fine; And Rhodes resembled it to the case reported by my Lord Dyer, 19. Eliz. 338. The Husband after marriage assur'd to his Wife a Joyniture, they both levy a Fine, Sur Copusans de droit come ceo que il ad, of the quitt of the Husband; that the same is not any Bar to the Wife of her Dower, for the Election is not given to the wife to claim her Joyniture, or her Dower, untill after the death of her Husband: And so in the principall case Judgement was given for the Wife.

Pasch. 26. Eliz. In the Kings Bench.

CCCLXXXVI. Lees Case.

Nicholas Lee by his will devised his Lands to William his second Son; And if he depart this world not having issue; Then I will that my Sons in Law shall sell my Lands, the Devisor at the time of his devise having six Sons in Law, dyed, William had Issue John, and dyed, John dyed without Issue, one of the Sons in Law of the Devisor dyed, the five surviving Sons in Law sold the Lands: First it was clearly resolved by the whole Court, That although the words of the Will are (ut supra) If Willi-

Devise;

am my Son depart this world not having Issue, &c. And that William had Issue who dyed without Issue; here, although it cannot be literally said, That William did depart this World not having issue, yet the intent of the Devisor is not to be restrained to the letter, that such construction shall be made, That whensoever William dyeth, in Law, or upon the matter without Issue, that the Land shall be subject to sale, according to the authority committed by the Devisor to his Sons in Law: And now upon the matter William is dead without Issue: As in a Fowment in Reverter or Remainder, although that the Donee in tail hath issue, yet if after the estate tail be spent, the Will shall suppose that the Donee dyed without Issue, a fortiori in the Case of a Will, or Devise, such construction shall be made. As to the other point, concerning the sale of the Lands, Wray asked, If the Sons in Law were named in the Will, and the Clerks answered, No: See 30 H. 8. Br. Devise, 31, and 39. Ass. 17, Executors, 117. such a sale good in case of Executors: See also 23 Eliz. Dyer, 371. and Dyer 4, & 5. Phil. and Mary, Lands devised in tail, and if the Devisee shall dye without Issue, that then the Land shall be sold, pro optimo valore, by his Executors, una cum assensu A, if A dyeth before sale, the power of the Executors is determined: And afterwards it was clearly resolved by the whole Court, That the sale, for the manner, was good, and Judgment was given accordingly.

Pach. 26 Eliz. In the Kings Bench.

CCCLXXXVIII. Sir Gilbert Gerrard and Sherringtons Case.

Sir Gilbert Gerrard Master of the Rolls, libelled in the Spirituall Court, against Sherrington, and A his Servant for Tythes parcell of a Rectory, whereof the said Sir Gilbert was Fermoyn to the Queen; It was moved by Egerton Solicitor Generall, That against the Kings Fermoyn a Prohibition doth not lye: But the opinion of the whole Court was, That a Prohibition doth lye, and so it hath been adjudged before. And afterwards, Exception was taken to the surmise, because the said Sir Gilbert had libelled against the said Sherrington and his Servant severally, and now in the Kings Bench they both had made a joint surmise, whereas they ought to have libelled in their surmises according to the severall Libells: And it was so adjudged by the Court, and therefore they were directed to make severall surmises: And afterwards Exception was taken, because the said Sherrington and his Servant, had delivered their surmises and suggestions by Attorney, where they ought to be in proper person: See the Statute of 2 E. 6. cap. 13. The party shall bring and deliver to the hands of some of the Justices of the same Court, &c. the true Copy of the Libell, &c. subscribed or marked with the hand of the Party, &c. and under the Copy shall be written the surmise or suggestion; And although it was affirmed by the Clerks of the Court, that the common use and practice for twenty years had been, not to exhibit such surmises or suggestions by Attorney: Yet it was resolved by the whole Court, that it ought to be by Attorney.

Pasch. 25 Eliz. In the Kings Bench.

CCCLXXXIX. Short and Shorts Case.

In an Action upon the Case upon Assumpsit to pay money to the Plaintiff Upon Request: It was agreed, That the Plaintiff by way of Declaratiⁿ, Request, or ought to allege an actuall Request, and at what place, and at what day the Request was made: And it is not sufficient to say, as in an Action of Debt, *Licet sibi quisquis requisitus, &c.* and so it was adjudged.

CCCXC. Pasch. 26 Eliz. In the Kings Bench.

He was Envicted in the County of Lincolne upon the Statutes of West. 1. Cap. 33. and 2. R. 2. Cap. 5. of Newes, and the words were, That Campian was not executed for treason, but for Religion, and that he was as honest a man as Cranmer, the Will was endorsed, *Billa vera*, but whether, ista verba prolati fuerunt, maliciose, sediciose, or e contr. ignoramus: The same Indictment being removed into the Kings Bench, the party, for the causes aforesaid, was discharged.

Indictment
upon the Sta-
tute of newes

Pasch. 26. Eliz. In the Kings Bench.

CCCXCI. Cole and Freindships Case.

In Ejectione firmæ, the Case was, That Fricarrock was seised, and by In-
Leasure betwixt himselfe of the one part, and one Freindship, his wife and
the Children betwixt them begotten at the Assignment of the Husband of the
other part, leased the said Land to the said Husband his wife and their Chil-
dren, at the Assignment of the Husband for years, they having at the time of
the said Lease but one Childe, i. a Son, afterwards they had many Children,
the wife dyed, the Husband by his will assigned his second Son borne after
the making of the Lease, to have the residue of the said Term, and by the
opinion of the Court nothing can come to the said Son by that Lease, or by
that Assignment, for if the Interest doth not vest at the beginning, it shall
never vest; And afterwards it was moved, If in as much as nothing could
vest in any of the Children born after the Lease made, if these words (At the
Assignment of the Husband) shoulde be void, and then the case shoulde be no
more, but that Land is devised to the Father and Mother, and their Children:
At another day, viz. Trin. 26 Eliz. the case was moved again, and as to
the first payment, the Court was of opinion as before, That the Child assign-
ed after the Lease made, shoulde not take: And then it was moved, That
because Freindship and his wife at the time of the making of the said Lease
had one Son that he shoulde take with his Father and Mother, and that the
words (at the Assignment of Freindship) shoulde be void, is matter of sur-
plusage, and the word Children a good name of purchase: But the whole
Court was against that conceit, for these words in the case, at the Assign-
ment of Freindship are not void, but shew what person shoulde take, if the in-
tent of the party shoulde take effect, i. he who the Father by Assignment shoulde
make, for no Child shall take but he who the Father shall assigne, that is
part of the contract, and although by such Assignment no title accrues to the
Child assigned, yet without Assignment no child is capable, for by the Lease
the Father hath such Liberty that he may assigne what child, he will: And
by

by Wray, If the words of the Lease had been (at the assignment of the Father within one moneth) and the Father surcease his moneth, the Interest should not vest in any of the Children: And by Ayliff Justice, If the words of the Lease had been (to the Husband and wife and their Son John, where his name is William) nothing shold vest: And paradventur in this case at the Bar, if the Father ha assigned his Son then borne, and had assigned him before or at the time of the Lease, i.e. the delivery of the Lease, it had been well enough: Note that this Action was brought by Cole Lessee of the Son of the Husband and Wife borne at the time of the Lease made: And after wards Wray, with the assent of all the rest of the Justices, gave Judgment that the Plaintiff, Nihil capiat per Billam.

CCCCXII. P[ro]sch. 26 Eliz. In the Kings Bench.

Execution here joyn, **N**Ote, It was agreed by the whole Court and affirmed by the clerks: That if Debt be brought upon an Obligation against two upon a joyn Præcipe, and the Plaintiff hath judgment to recover, that a joyn Execution ought to be sued against them both: But if the suit were by one Original and severall Præcipes, execution might be sued against any of them.

CCCXCIII. Trin. 26 Eliz. In the Kings Bench.

Replevin. **I**n a Replevin, The Defendant doth avow per Damage Feasant, and shewed that the Lady Jermingham was seised of such a Mannor whereof, &c. and leased the same to the Defendant for years, &c. The Plaintiff said, That long before King H. 8. was seised of the said Mannor, and that the place where is parcell of the said Mannor demised and demisable by copy, &c. and the said King by his Steward demised and granted the said parcell to the Ancestor of the Plaintiff whose heire he is, by copy in fee, &c. upon which it was demurred, because by this Bar to the Avowry, the Lease set forth in the Avowry is not answered, for the Plaintiff in the Bar to the Avowry, ought to have concluded, and so was seised by the custome, untill the Avowant, prætextu of the said Term for years entred: And so it was adjudged.

Trin. 26 Eliz. In the Kings Bench.

CCCXCIV. The Lord Dacres Case.

Seawardship of a Manor, Office of Trust.

Grants per copy, Deputy Steward.

In Ejectione firmæ, the case was, That the Lord Dacres was seised of the Mannor of Eversham, and that I Sheld the place where of the said Mannor by copy for term of his life, and the said Lord granted the Stewardship of the said Mannor to the now Marquesse of Winchester, who appointed one Chedle to be his Deputy to keep a court, & ad tradendum, the said Land (IS being now dead) to one Wilkins by copy for life, afterwards, the said Chedle commanded one Hardy his Servant to keep the said court, and grant the said Land by copy, ut supra, which was done accordingly, the copy was entred, and the Lord Dacres subsigned it and confirmed it: It was further found, That Hardy had many times kept the said court both before and after, and that the custome of the Mannor was, that the Steward of the said Mannor for the time being, or his Deputy might take Surrenders, and grant estates by copy: And if this estate so granted by Hardy were good or not, was the question, because by the Servant of the Deputy, whereas the custome found did not ex tend

tend further then the Deputy: It was argued that the estate granted, ut supra, was void, for a Deputy cannot transfer his authority over, for it is an office of trust: See 39. H 6. 33, 34. 14 E. 4. 1. and 6 Eliz. it was adjudged, That the Duke of Somerset had diverse Stewards of his Lands, and they, in the name of the said Duke made diverse Leases of the Lands of the said Duke, renewing Kent, and the Duke, afterwar do assented to the said Leases, and received the Rents reserved upon them, and yet after the death of the said Duke, the Earle of Hertford his Son and Heire avoided them: So here, the assent, and the subscription of the copy by the Lord Dacres, doth not give any strength to the copy which was void at the beginning; against which it was said, That to take a Surrender, and to grant an estate by copy is not any judicall Act, but meerly an Act of service, and no matter of trust is transferred to Hardy, for trust is reposed in him who may deceive, which cannot be in our Case, for here is an expresse commandment, which if Hardy transgresse it is absolute void, for nothing is left to his discretion: And the admitting of a Copy-holder is not any judicall Act, for there need not be any of the Suits there who are the Judges: And such a Court may be holden out of the Precinct of the Manors, for no Pleas are holden, which was concessum per totam Curiam: And by Ayliff Justice, If the Lord of such a Manor makes a Feoffment of a parcell of his Manor which is holden by copy for life, and afterwards the Copy-holder dyeth, although now the Lord hath not any Court, yet the Feoffee may grant over the Land by copy againe: And the whole Court was clear of opinion, That the grant for the manner of it was good, especially because the Lord Dacres agreed to it; And Judgment was given accordingly.

Trin. 26. Eliz. in the Kings Bench:

CCCXCV. Burgelle and Fosters Case:

In Ejectione firmæ, the case was, That the Dean and Chapter of Ely were Seised of the Manor of Sutton, whereof the place where, &c. is parcell, demised and demisable by copy according to the custome, and by their Deed granted the Stewardship of the said Manor to one Adams to execute the said office, per se vel legitimū suum Deputatum eis acceptabilem: Afterwards Surrenders. Adams made a Letter of Deputation to one Mariot, ad capiendum unum sursum redditio[n]em, of one I W, and I his Wife, and to examine the said lands, as intentione, that the said I W and A might take back an estate for their liues, the Remainder over to one Joan Buck in Fee (Note, the Surrendo[ur] ought be, de duobus Messuagijs) Mariot took two severall Surrenders from the said Husband and Wife, the Remainder over to the said John Buck in Fee, upon condition to pay a certain sum of money, &c. I was moved, That the Surrender is void, and without warrant, for the warrant was, ad capiendum unum sursum redditio[n]em, and here are two severall Surrenders, and so the warrant is not pursued, and then the Surrender is void: Another matter was because the Remainder to John Buck by the words of the Deputation was absolute and without Condition, and now in the Execution of it, it is conditional, so as this conditional estate is not warranted by the Deputation: But the whole Court was clear of a contrary opinion in both the points, and that all the proceedings were sufficient and well warranted by the Deputation: Another matter was objected, because that this Surrender and re-grant is entred in the Roll of a Court, dated to be holden the second of Maij, and the Letter of Deputation bears date the third of June after: But as to that, The Court was clear of opinion, that the misentry

of the date of the Court should not prejudice the party, for this Entry is not matter of Record, but is but an Escape, and if the parties had been at Issue, upon the time of the Surrender made, or of the Court holden, the same should not be tryed by the Rolls of the Parvoz, but by the Country, and the party might give in Evidence the truth of the matter, and should not be bound by the Roll, and according to this Resolution of the Court, Judgement was given.

CCCXXI. Mich. 26, & 27 Eliz. In the Kings Bench.

Fines levied. *Scire facias.*
The Case was : Tenant in tail lealed for sixty years, and afterwards lealed a fine to Lee and Loveday, Sur Councillans de droit come ceo, &c. with a Renter to him and his Heirs in fee ; And upon a Scire facias against the Councillors, supposing the Lands to be ancient Demesne, the Defendants made default for which the Fine was avoyded, and now the Issue in tail entred upon the Lessee for years, and he brought an Ejectione firmæ, and it was found, That the Land was Frank Fee ; And all the question was, If by the Reversall of the Fine by Writ of Dilcet, without suing forth a Scire facias against the Terr. Tenant shoulde bind him, or shoulde be void only against the Councillor, and not against the Lessee : Akin. It shall not bind the Lessee for years : For a Fine may bind in part, & in part not : as bind one of the Councillors, and not the other, 7 H. 4. 111. A Fine levied of Lands, part ancient Demesne, & part at the common Law, the same was by Writ of Dilcet reversed in part, as to the Land in ancient Demesne, and stood in force for the residue, 8 H. 4. 136. And there by award of the Court issueth forth a Scire facias against the Terr. Tenants, and the Justices would not abnul the Fine, without a certificate that the Land was Ancient Demesne, notwithstanding that the Defendant had acknowledged it to be so, but as to them who were parties to the Fine, the Fine is become void as to the said parties, and he who had the Land before might enter, i. And he said it shoulde be a great inconvenience, if no Scire facias, or other Proces shoulde be awarded against the Terr. Tenant, for he shoulde be dispossed and disinherited without priuy, or notice of it, whereupon a Scire facias, he might plead matter of discharge, and Bar of the Writ of Dilcet, as a Release, &c. which see Fitz. N. B. 93. And so althoough the Fine be reversed, yet he might retain the Land, and he resembled this case to the case of 2 H. 4. 16, 17. In a contra formam collationis against an Abbot, a Scire facias shall issue forth against the Feofee, and so by the same reason here : And so the principall matter he said, That the Fine shoulde be avoyded but against the parties, but not against the Lessee : Kingsmill. The Scire facias brought against the parties only is good enough, for they were parties to the Dilcet, and not the Terr. tenants : It was adorneed.

CCCXCVII. Mich. 26, & 27 Eliz. In the Kings Bench.

Error.

Appearance by Attorney.

A Writ of Error was brought upon a Judgment in a Quid juris clamat, It was assigned for Error, that the Tenant did appeare by Attorney, whereas he ought not but in person because he is to doe an Act in proper person, if it be not in case of necessity, where the Attorney may be received by the Kings Writ, or plead matter in Bar, of the Attornement, as if he claims fee, &c. or other peremptory matter, after which Plea pleaded he may make Attorney, 48 E. 3. 24. 7. H. 6. 69. 21 E. 3. 48. 1 H. 7. 27. Another Error was because it is not shewed in the Quid juris clamat, what estate the Tenant hath : Another matter was, If the Gzantee of the estate of Tenant in tail after possibility of issue extint shall be driven to attorney, and it was said

said he shold not, for the privilege doth passe with the grant: See 43 E. 3.
1. Tenant in tail after possibility of issue extint shall not be driven to attorne, 46 E. 3. 13. 27. Ergo, neither his Grantee: Williams contrary, As to the appearance of the Tenant by Attorney, because the same is admitted by the Court, and the Plaintiff, the same is not Error, which see 1 H. 7. 27. by Brian and Conisby, 32 H. 6. 22. And he said, That the Grantee shold be driven to attorne, for no other person can have the estate of the Tenant in tail after possibility of issue extint, but the party himselfe, therefore not the privilege, and although he himselfe be dispuishable of walt, yet his Grantee shall not have such privilege. As if Tenant in Dower, or by the curtesie, grant over their estates, the Heire shall have Walt against the Grantors for Walt done by the Grantee, but if the heir granteth over his Reversion, then Walt shall be brought against the Grantees: See Fitz. N.B. 56. And if two Coparceners be, and the one taketh a Husband and dyeth the Husband being Tenant by the curtesie, a Writ of Partition lyeth against him, but if he granteth over his estate, no Writ of Partition lyeth against the Grantee, 27 H. 6. Scathams Ait. Tenant in tail after possibility of issue extint shall not have Aide, but his Grantee shall have Aide, Clark, The Grantee of Tenant in tail shall not be driven to attorne, If Tenant in tail grant to him scatom suum, the Grantee is dispuishable of walt, so if his Grantee gavt it obey sis Grantee is also dispuishable, &c. It was adjoined.

If the Grantee
of Tenant af-
ter possibility
shall attorne;

Mich. 26 & 27. Eliz. In the Kings Bench.

CCCXVIII. Gravenor and Masleys Case.

Gravenor brought a Writ of Error upon a common Recovery against Massey: And in the said Recovery four Husbands and their Wives were bouched, and now the Plaintiff brought this Writ of Error as heir to one of the Husbands, and Exception was taken to his Writ, because the Plaintiff doth not make himselfe heir to the Survivor of the four Husbands. Egerton, The Writ is good enough, for there is a difference betwixt a Co-tenant personall, and a Covenant real, for if two be bound to warranty, and the one dyeth, the Survivor and the heir of the other shall be bouched, and he laid each of the four and their heirs are charged, and then the heir of each of them being chargeable, the heire of any of them may have a Writ of Error. And afterwards the Writ of Error was adjudged good: And Error was assigned because the Tounches appeared the same day that they were bouched by Attorney, which they ought not to doe by Law, but they might appear gracie the first day without Proces in their proper persons, and so at the sequitur sub suo periculo: See 13 E. 3. Attorn, 74. and 8 E. 2. ib. 101. Another Error was assigned Because the Entry of the warrant of Attorney, for one of th. Tounches is po. lo. suo. lD against the Tenant where it shold be against the Demandant, for presently when the Tounche entred into the warranty, he is Tenant in Law to the Demandant: Coke, As to the first Error, Although he cannot appear by Attorney, yet when the Court hath admitted his appearance by Attorney, the same is well enough, and is not Error: As to the other Error, I confess it to be Error, but we hope that the Court will have great consideration of this case as to that Error, for there are one hundred Recoveries erroneous in this point, if it may be called an Error: And then we hope, to avaid such a generall mischeif, that the Court will consider and dispense with the rigor of the Law: As their Predecessors did, 29 H. 6. 30. In the Writ of Pleine: But I conceive, That the Writ of Error is not well brought, for the Toucher in the said Recovery is of four Husbands and their Wives, and when Toucher shall be intended to be in

the right of their Wives, which see 20 H. 7. i. b. 46 E. 3. 28. 29 E. 3. 49. And so by common intendment, the Wouther shall be construed in respect of the Wife; So also the Plaintiff here ought to entitle himselfe as this Writ of Error as heir to the Wife: And for this cause, The Plaintiff relinquished his Writ of Error; And afterwards he brought a new Writ, and entituled himselfe as heir to the wife.

Mich. 26 & 27 Eliz. In the Kings Bench.

CCCXCIX. The Queen, and the Dean of Christchurch Case.

Præmunire.

The Queens Attorney General brought and prosecuted a Præmunire ^{for} the Queen, and Parret against Doctor Matthew Dean of Christchurch in Oxford, and others, because they did procure the said Parret to be sued in the City of Oxford, before the Commissary there in an Action of Trespass, by Libell according to the Ecclesiastical Law, in which suit Parret pleaded, Son Franktenent, and so to the Jurisdiction of the Court, and yet they did proceed, and Parret was condemned and imprisoned: And after that suit depended, The Queens Attorney withdrew the suit for the Queen; And it was moved, If notwithstanding that the party grieved might proceed: See 7 E. 4. 2. b. The King shall have Præmunire, and the party grieved his Action: See Br. Præmunire, 13. And by Brook none can have Præmunire but the King: Coke, There is a President in the Book of Entries, 427. In a Præmunire, the words are (ad respondendum tam Domino Regi, quam R. F.) and that upon the Statute of 16 R. 2. and ibi. 428, 429. Ad respondendum tam Domino Regi de contemptu, quam dict. A. B. de damnis: But it was holden by the whole Court, That if the Kings Attorney will not further prosecute, the party grieved cannot maintain this suit, for the principall matter in the Præmunire is, The conviction and the putting of the party out of the protection of the King, and the damages are but accessary, and then the principall being released, the damages are gon: And also it was holden by the Court, That the Presidents in the Book of Entries are not to be regarded, for there is not any Judgment upon any of the pleadings there, but are good directions for pleadings, and not otherwise.

CCCC. Mich. 26, & 27 Eliz. In the Kings Bench.

Fines levied,

Forfeiture.

Conditions.

The Case was, A gave Lands in tail to B upon condition, That if the Donee or any of his heirs alien, or discontinue, &c. the Land or any part of it, that then the Donee to re-enter: The Donee hath issue two Daughters and dyeth: One of the two Daughters leuyeth a Fine, sur Conusans de droit come ceo, to her Sister: Heale Serjeant, The Donee may enter, for al though the Sisters to many intents are but one Heire, yet in truth they are severall Heires, and each of them shall sue Livery, 17 E. 3. If one of the Sisters be discharged by the Lord, the Lord shall lose the Wardship of her, and yet the heire is not discharged: And if every Sister be heire to diverse respects, then the Fine by the one Sister is a cause of Forfeiture: Hatis contrary, For conditions which goe in defeating of estates shall be taken shortly, and here both the Sisters are one heire, and therefore the discontinuance by the one, is not the Act of the other: Clench Justice, The words are, Or any of his heires, therefore it is a forfeiture, quod fuit concessum per totam Curiam: And Judgment was given accordingly.

Mich.

CCCCI. Mich. 26, & 27 Eliz. In the Kings Bench.

The Case was, A woman seised of a Rent-charge for life, took Husband, Assumpsit.
 the Rent was arreare, the wife dyed, the Tenant of the Land charged,
 Promised to pay the Rent in consideration that the Rent was behind, &c.
 and some were of opinion, Because that this Rent is due and payable by a
 Deed, that this Action of the Case upon Assumpsit will not lye, no more then
 if the Obligor will promise to the Obligee to pay the money due by the Obli-
 gation, an Action doth not lye upon the Promise, but upon the Obligation;
 But it was holden by the whole Court, That the Action did well lye, for here
 the Husband had remedy by the Statute of 32 H. 8. And then the considera-
 tion is sufficient, and so Judgment was given for the Plaintiff.

Hil. 27. Eliz. In the Kings Bench.

CCCCII. Williams and Blowers Case.

Reignold Williams and John Powell brought a Writ of Error against the Error,
 Bishop of Hereford and Blower upon a Recovery had in a Writ of Dis-
 ceit by the said Bishop and Blower against the said Williams and Powell, for
 that the said Williams had before brought a Quare Impedit against the said
 Blower and the Bishop, and had recovered against them by default, where-
 upon Williams had a Writ to the Metropolitan to admit his Clerke, and in
 the Writ of Disceit Indgement was given for the Plaintiffs; for it was
 found, That the Summons was the Fryday to appeare the Tusday after,
 And so an insufficient Summons, and in that Writ of Disceit the Defen-
 dants, Williams and Powell pleaded, That Blower the Incumbent was depri-
 ved of his Benefice in the Court of Audience, which sentence was affirmed
 upon Appeal before the Delegates; and notwithstanding that Plea, Judg-
 ment was given against Williams and Powell Defendants in the said Writ
 of Disceit: And upon that Judgement, This Writ of Error is brought.
 Beaumont assigned four Errors, First, because the Bishop and Blower joyn-
 ed in the Writ of Disceit, for their Rights are severall, 12 E. 4. 6. Two
 cannot joyn in an Action of Trespass upon a Battery done at one time to
 them: So if one distract at one and the same time, the severall Goods of
 diverse persons, they according to their severall properties shall have severall
 Replevins, 12 H. 7. 7. By Wood: So if Lands be given to two, and to the
 heirs of one, and they lose by default in a Preceipe brought against them, they
 shall have severall Writs, the one Quod ei deforcat, the other a Writ of Action.
 Right: 46 E. 3. 21. A Fine levied to one for life, the Remainder to two
 Husbands and their Wives in tail, they have Issue and dye, Tenant for
 life dyeth, the Issues of the Husbands and Wives shall have severall Scire
 facias's to execute the Fine by reason of their severall Rights: Lands in an-
 cient Demise holden severally of severall Lords are conveyed by Fine, the
 Lords cannot joyn in a Writ of Disceit, but they ought to have severall
 Writs, so here the Plaintiffs in this Writ of Disceit, and the Bishop claims
 nothing but as Ordinary, and he loseth nothing in the Quare Impedit, and
 therefore by the Writ of Disceit he shall be restored to nothing: The second
 Error was, Because the Bar of the Defendants in the Writ of Disceit was
 good, i. the deprivation, &c. and the Court adjudged it not good, for the Clerk
 being deprived, he could not enjoy the Benefice, if the Judgment in the
 Quare Impedit had been reversed, and where a man cannot have the effect of
 his suit, it is in vain to bring any Action; Lessee for the life of another loseth
 Regula.

Deprivacion.

Scire facias.

by erroneous Judgment, Cestuy que use dyeth, his Writ of Error is gon, for if the Judgment be reversed he cannot be restored to the Land, for the estate is determined. 31 E. 3. Incumbent, 6. The King brought a Quare Impedic against the Incumbent and the Bishop, the Bishop claimed nothing but as Ordinary; The Incumbent traversed the title of the King, against which, it was replied for the King, That the Incumbent had resigned pendant the Writ, so as now he could not plead any thing against the title of the King, for he had not possession, and so could not counterplead the possession of the King: And here in our Case by this deprivation the Incumbent is disabled to maintain this Action of Disceit, 15 Ass. 8. If the Guardian of a Chappell be impleaded in a Precipe for the Lands of his Chappell, and, pendant the Writ, he resigns, the Successor shall have the Writ of Error, and not he who resigns, for he is not to be restored to the Lands, having resigned his Chappell: So in our case, A deprivation is as strong as a Resignation. The third Error, because in the Writ of Disceit, it is not set forth that Blower was Incumbent, for the Writ of Disceit ought to containe all the speciall matter of the Case, as an Action upon the case, 4 E. 3. Disceit, 45. The fourth Error, That upon suggestion made after Verdict, that Blower was Incumbent, and in, of the presentment of the Lord Scrafton, and that he was removed; and Griffin in by the Recovery in the Quare Impedic by default, a Writ to the Bishop was awarded without any Scire facias against Griffin, for he is possessor, and so the Statute of 25 E. 3. calls him, and gives him authority to plead against the King, and every Releafe, or Confirmation made to him is good, 18 E. 3. Confirmation made by the King after Recovery against the Incumbent is good; And 9 H. 7. If a Recovery be had in a Contra formam collationis, the possessor shall not be ousted without a Scire facias, so in Audita Querela upon a Statute Staple, Scire facias shall go against the Assignee of the Connsee, 15 E. 3. Respon. 1. See also, 16 E. 3. Disceit, 35. 21 Ass. 13. A Fine levied of Lands in Ancient Demesne shall not be reversed without a Scire facias against the Tenant: Walmesley contrary, The case at the Bar differs from the case put of the other side, for they are tales put upon Original Writs, but our case is upon a judicall Writ, and here nothing is demanded but the Defendant is only to answer to the Disceit and false hood: And in this Case the Issue is contained in the Writ which is not in any Originall Writ, and the Judges shall examine the issue without any plea or appearance of the Tenant, and here the Defendant is not to plead any thing to excuse himselfe of the wrong; And here the Judgment is not to recover any thing in demand, but only to restore the party to his former estate, and possession, and if he hath nothing, he shall be restored to nothing; And he putt many cases where persons who have severall Rights may joyne in one Action, as a Recovery in an Assize against severall Tenant's, they may joyne in one Writ of Error, 18 Ass. Recovery in Assize against Dishesor and Tenant, they shall both joyne in Error, why not also in Disceit: 19 E. 3. Recovery against two Caparceners, the Survivor, and the heir of the other shall joyne in Error. As to the second Error, Williams and the Sheriff ought not to joyne in the Plea, and also the Plea it selfe is not good, for the Writ of Disceit is, That Williams answer to the Disceit, and the Sheriff shall certifie the proceedings and therefore he shall not plead: and also the Plea it selfe is not good, for although the Interest of the Incumbent be determined in the Church, yet his Action is not gone; as is in a Precipe quod reddat, the Tenant alieneth pendant the Writ, and afterwards the Tenant rec overeth, yet the Tenant although his Interest be gon by the Feoffement, yet he shall have a Writ of Error, and so here, and as to the Scire facias, there needs none here against the new Incumbent, for he comes in, pendant

dant the Writ, and that appears by the Record, but if he had been in before the Writ brought, then a Scire facias would lyse : See 9 H. 6. It was adjoined.

Mich. 26, & 27 Eliz. In the Kings Bench.

CCCCIII. Flemmings Case.

Flemming was indicted upon the Statute of 1 Eliz. because he had given the Sacrament of Baptisme in other forme than is prescribed in the said Statute, and in the Book of common Prayer, and the said Indictment was before the Justices of Assize, Wray and Anderson. Of such offence done before, and now he is indicted againe, for which, It was awarded that he suffer Imprisonment for a year, and shall be adjudged, ipso facto, deprived of all his spirituall promotions : And upon the Indictment Flemming brought a Writ of Error, and assigned Errour because in the second Indictment no mention is made of the first Indictment, in which case the second Indictment doth not warrant such Judgment : Wray Justice, If the first Indictment be before us, then is the second Judgment well given, contrary if it be before other Justices. Clench, The second Indictment ought to conceive the first conviction, and if one be indicted for a Rogue in the second degree, the first conviction ought to be contained in such Indictment, and in an Indictment the day and time are not materiall as to true recovering in facto ; And it might be that this last Indictment was for the first offence for any thing appeareth : Coke who argued to the same intent, Compared it to the Case of 2 R. 2. 9. and 22 E. 4. 12. 12 H. 7. 25. Indictment certified to be taken coram A B Justiciariis Domini Regis ad pacem, &c. without saying, nec non ad diversas felonias, &c. is void, and if a man hath been once convicted, he shall not have his Clergy if it appeareth upon Record before the same Justices, that he had his Clergy before.

Hil. 27. Eliz. In the Kings Bench.

CCCCIV. The Mayor of Lynns Case.

The Mayor of Lynn was Indicted for that he had received twenty four shillings of one A for giving of Judgment in an Action of Debt, depending before him against one B, and he was indicted thereof as of extortion, In contemptum dictae Dominæ Reginæ, & contra formam Statuti : Coke, The Indictment is insufficient for there is not any Statute to punish any Judge for such a matter : For the Statute of West. 1. Cap. 26. is made against Sheriffs, Cap. 27. Clerks of Justices, Cap. 30. The Marshall and his Servants, Statute 23 H. 6. against Sheriffs, and other Statutes against Officers ; But no Action lies against a Judge, for that which a Judge receiteth is Bribery and not Extortion. Et satis præn[on] est, judici quod Deum habet alorem, and therefore he said the party indicted ought to be discharged : Gaudy Justice, If in the Indictment there be words of Extortion or Bribery, although such an offence in a Judge be not materially Extortion, if these words contra pacem, &c. had been in the Indictment it had been good, quod Clench concessit : And afterwards the party was discharged.

CCCCV. Mich. 28, and 29: Eliz. In the Kings Bench;

Crisp and Goldings Case:

Assumpsit.

In an action upon the Case by Crisp against Golding, the Case was, That a Feme sole was Tenant for life, and made a Lease to the Plaintiff for five years, to begin after the death of Tenant for life, and afterwards the 18. of October made another Lease to the same Plaintiff for 21 years, to begin at Michaelmas next before; and declaring upon all the said matter, he said, *virtute cuius dimissionis*, i.e. the later Lease, the Plaintiff entered and was possessed craft. Fest. 5. Mich. which was before the Lease made, & further declared, that in consideration that the Plaintiff had assigned to the Defendant these 2 leases, the defendant promised &c. & upon non Assumpsit it was found for the Plaintiff and damages taxed 600 l. Coke argued for the Plaintiff against the Sollicitor Generall, who had taken divers exceptions to the Declaration, i. Where two or many considerations are put in the Declaration, although that some be void, yet if one be good the action well lieth, and damages shall be taxed accordingly, and here the consideration that the Plaintiff should assign *totum statum, titulum, & interesse suum quod habet in terra praedita.* 2. Exception, that the Lease in possession was made after Michaelmas, i. 18. October, and the Declaration is, *virtute cuius dimissionis*, the Defendant entered cr. anno Mich. and then he was a disseisor and could not assign his interest and right, which was suspended in the tortious disseisin, and so it appears to the Judges, and he laid there was not here any disseisin, although that the Lessee had entered before that the Lease was made; for there was an agreement, & communication before of such purposed and intended Lease, although it was not as yet effected, and if there were any assent or agreement that the Lessee should enter, it cannot be any disseisin, and here it appeareth that the Lease had his commencement before the making of the Lease, and before the entry: But put case it be a disseisin, yet he assigned all the Interest *quod ipse tunc habuit*, according to the words of the consideration, and he delivered both the Indentures of the said Demises, and quacunque via dan, be the assignment good or void it is not materiall, as to the Action, for the consideration is good enough. Egerton Sollicitor contrary. In every action upon the Case, upon Assumpsit, there ought to be a Consideration, promise, and breach of promise, and here in our Case the Consideration is, the assignment of a Lease, which is to begin after the death of the Lessor, who was but Tenant for life, which is merely void, and that appeareth upon the Record, and as to the second part of the Consideration, and the Assignment of the second Lease, it appeareth, that the Plaintiff at the time had but a Right, for by his untimely entry before the making of the Lease, he was not to be said Lessee, but was a wrong doer, &c. in 19 Eliz. in the Kings Bench, this difference was taken by the Justices there, and delivered openly by the Lord Chief Justice, i. When in Action upon the Case, upon Assumpsit 2 Considerations or more are layd in the Declaration, but they are not collateral, but pursuant, as A. is indebted to B. in 100 l. and A. promises to B. that in Consideration that he owe him 100 l. and in consideration that B. shall give to A. 2 s. that he will pay to him the said 100 l. at such a day, if B. bring an action upon the Case, upon this Assumpsit, and declares upon these two promises, although the Consideration of the 2. be not performed, yet the Action doth well lie: But if they be collateral considerations, which are not pursuant, as if I in consideration that you are of my Counsell, and shall ride with me to York, promise to give to you 20 l. in this case all the considerations ought to be proved, otherwise the Action cannot

cannot be maintained: So in our case, the considerations are collateral, and therefore they ought to be probed, and afterwards judgement was given for the Plaintiff.

Hill 28 and 29 Eliz. In the Common Pleas.

CCCCXLVI. Fooly and Prestons Case.

In an Action upon the Case, the Plaintiff declared That whereas John Gibbon was bound unto the Plaintiff in quodam scripto obligatorio, sigillo suo sigillat, and coram, &c. recognito in forma Statuti Scapul. The Defendant in consideration that the Plaintiff would deliver to him the said writing, to read over, promised to deliver the same again to the Plaintiff within six dayes after, or to pay to him 1000l. in lieu thereof, upon which promise the Plaintiff did deliver to the Defendant the said writing, but the Defendant had not nor would not deliver it back to the Plaintiff, to the great delay of the Execution thereof, and the Defendant did demur in Law upon the Declaration; it was objected that here is no sufficient consideration appearing in the Declaration upon which a promise might be grounded, but it was the opinion of the whole Court, that the consideration set forth in the Declaration was good and sufficient, and by Anderson, it is usual and frequent in the Kings Bench: if I deliver to you an Obligation to reball unto me, I shall have an action upon the Case, without an expresse Assumption, and afterwards judgement was given for the Plaintiff.

Hill 28. and 29. Eliz. In the Common Pleas.

CCCCVII Wallpool and Kings Case.

William Wallpool was bound to King by Recognition in the summe of 400l. and King also was bound to Walpool in a Bond of 100l. Walpool according to the Custome of London, affirmed a Plaintiff of Debt in the Guildhall London against the said King, upon the said Bond of 100l. and attached the debt due by himself to Wallpool in his own hands, and now King sued Execution against the said Wallpool upon the said Recognition, and Wallpool upon the matter of Attachment brought an Audita querela, and payed allowance of it, and by Gavdy Herjeant, such a writ was allowed in such Case, 26 Eliz. Anderson at the first doubted of it, but at last the Court received the said writ de bene esse, and granted a Supersedeas in stay of the Execution, and a Scire facias against King, but ea lege, that Wallpool should find good and sufficient Sureties, that he would sue with effect, and if the master be found against him, that he pay the Execution.

Attachment
in London.

CCCCVIII. Hill 28. and 24. Eliz. In the Common Pleas.

A copy holder with license of the Lord leased for years, and afterwards surrendered the Reversion with the Rent, to the use of a stranger, who is admitted accordingly. It was moved, if here need any Attornement, either to settle the Reversion, or to create a Privity, and Rhodes and Windham Justices were of opinion, that the surrender and admittance are in the nature of an Attornement, and so amount to an attornement, or at least to supply the want of it.

Mieb. 28 Eliz. In the common Pleas.

CCCCIX. Ruddall and Millers Case.

Devise.

Conditions.

Southernes
case.

Clarendius
case.

In Trespass, the Case was this, William Ruddall Serjeant at Law, 18 H. 8. made a Feoffment in Fee to diverse persons to the use of himselfe and his Heirs, and 21 H. 8. declared his Will, by which he devised his Lands to Charles his younger Son, and to the Heires males of his body, the Remainder to John his eldest Son in Fee, upon condition, That if Charles or any of his issue shold discontinue or alien but only so to make a Joynure for their wives for terme of their lives, that then, &c. and dyed; The Statute of 27 H. 8. came, Charles made a Lease to the Defendants for their lives, according to the Statute of 32 H. 8. And levied a Fine with Proclamation, for Conulsans de droit come eeo, &c. to the use of himselfe and his wife, and the Heires Males of their two bodies begotten, the Remainder to himselfe and the Heires Males of his body, the Remainder to the right Heirs of the Devise, John the eldest Son entred for the Condition broken upon the Defendants, who re-entered, upon which Re-entry the Action was brought: Gawy, Fleetwood, and Shuttleworth Serjeants, for the Plaintiffs: This Condition to restrain unlawfull discontynuance is good, as a Condition to restrain Waste, or Felony: See 10 H. 7. 11. 13 H. 7. 23. And before the Statute of Quia Emptores terrarum: If A had enfeoffed B upon Condition, That B noz his Heirs shold alien, the same was a good Condition by Fleetwood (which was granted per Curiam) And this Condition was annexed to good purpose, for the Serjeant knew well, That Cestuy que use might have levied a Fine, or suffered a Recovery by the Statutes of 1 R. 3. 4 H. 7. And this Condition annexed or tyed to the use by the Will is now knit to the possession which is transferred to the use by the said Statute: Although it may be objected that the Condition was annexed to the use, and now the use is exting in the possession, and by consequence the Condition annexed thereto, as where a Seignory is granted upon Condition, and afterwards the Tenancy escheats, now the Seignory is exting, and so the Condition annexed to it: But as to that, it may be answered, That our Case cannot be resembled to the Cases at common Law, but rests upon the Statute of 27 H. 8. scilicet Cestuy que use shall stand and be soised, deemed and adjudged in lawfull seisin, estate and possession of and in such Lands to all intents, consistencies, and purposes in Law, of and in such like estates as he had in the use, and that the estate, right, title, and possession that was in the Feoffee shall be clearly deemed and adjudged to be in Cestuy que use, after such quality, manner, forme, and condition as he had in the use: And therefore in the common assurance by Bargaine and Sale by Deed enrolled, if such assurance be made upon Condition, As in case of Mortgage, the possession is not raised by the Bargainer, but by the Bargaine an use is raised to the Bargainee, and the possession executed to it by the Statute, and the Condition which was annexed to the use only is now conjoyned to the possession, and so it hath been adjudged: So if the Feoffees to use before the Statute, had made a Lease for life, the Lessor commits Waste, the Statute comes, now Cestuy que use which was, shall have an Action of Waste, as it was adjudged in Justice Southernes Case: So a Title of Cessay in the Feoffees shall be executed by the Statute. So if the King grants to the Feoffees in use, a faire, Market, or Warren, these things shall be executed by the Statute, as it was holden in the Case of Clarendius: As to the Condition, They conceived, That it is broken, for whiche the Devise had allowed to the Devisee to discontinue for life, to make a Joynure

Joynture to his wife, now he hath exceeded his allowance, for he might have made a Joynture to his wife indecible by Fine upon a Grant upon a Render for life, &c. But this Fine with the Proclamations is a Bar to the former entail which was created by the Devil, and hath created a new entail, and the former tail was barred by the Fine against the intent of the Devil: Also by this Fine he hath created a new Remainder, so as his Issue inheritable to this new entail, might alien and be unpunished, which was against the meaning of the Devil: And as to the Lease for lives to the Defendants, the same is not any breach of the Condition, for that is warranted by the Statute of 12 H. 8. which enables Tenant in tail to make such a lease, so as it cannot be said a Discontinuance, which Anderson and Periam granted: But the Fine levied after is a breach of the Condition, and then the Reentry upon the Lessees, who have their estates under the Condition is lawfull: As where the wife of the Feoffee upon Condition is endowed, and afterwards the Condition is broken, now by the Reentry of the Feoffee, the Power is defeated: And Shurleworth put this case, A Feoffment is made upon Condition, That the Feoffee shall lease the Lands to A for life, and afterwards grant the Reversion to B in Fee, the Feoffee may re-enter, for by this Conveyance he in the Reversion is immediate Tenant to the Lord, where by the intended assurance, the particular Tenant ought to be. Puckring, Fenner, and Walmesley contrary: And by Walmesley, By this devise the use only passeth, and not the Land it selfe, for the Statute of 1 R. 3. extends only to Acts executed in the life of Cestuy que use, and not to devises which are not executed till after the death of the Devil, which see 4 Ma. Dyer 143. Trivilians Case, See also 6 E. 6. Dyer, 74. The Lord Bourchier Case, but 10 H. 7. Cestuy que use devileth, That his Executors shall sell the Land, now by the sale of the Land in possession, for the same is in a manner an Act in his life, for the Vendee is in by Cestuy que use, and here is a Condition, and not a Limitation, for the nature of a Condition is to draw back the estate to the Feoffee, Donor, or Lessor, but a Limitation carrieth the estate further: And he conceived, That the Condition is not broken by this Act, for the intent of the Devil is pursued, for his meaning was, That the wife should have a Joynture indecible against the Issue in tail, and that the inheritance should be preserved; That both should be observed; and he said, that this Fine being levied by him in the Reversion upon an estate for life, is not any discontinuance, but yet shall bar the estate Tail. And the Justices were clear of opinion, that the Condition is broken, and also that the intent of the Condition is broken, for it might be, that Charles had issue by a former wife, which by this Fine should be disinherited, and a new Entail set on foot against the meaning of the Devil, &c. and afterwards Judgement was given for the Plaintiff.

Hill. 31. Eliz. rot. 355. In the Kings Bench.

CCCCX Simmes and Wescots Case.

In an Action upon the Case, the Plaintiff declared, That in consideration, that he would marrie the Defendants Daughter, the Defendant promised, to give him 20l. and also to procure him all the corn growing upon such Lands, and to provide necessaries for the wedding dinner, the Defendant did confess the communication betwix them, and that he promised to give the Plaintiff 20l. so as he would procure a Lease of certain Lands to his Daughter for her life, absque hoc, that he promised modo & forma: The Jury found the promise of the 20l. but not any other thing, it was moved in arrest of Judgement, that the Assumpsit wheresof the Plaintiff hath

declared, although it consist of divers things, yet it is entire, and if the whole is not found, nothing is found, and the Case of 21 E. 4. 22. was cited touching variance of Contract, as where an action of Debt is brought upon a Contract of a horse, and the Jury find a Contract for two horses, the Plaintiff shall never have judgement; on the other side it was said, That the Plaintiff shall recover damages for the whole that is found, &c. for the 20. See 32 H. 8. br. Issue 90. In an action upon the Case, the Plaintiff declared, that the Defendant did promise to deliver four woollen cloaths, the Defendant pleaded, That he did promise to deliver four linnen cloathes, absque hoc, that he promised, &c. the Jury found, That the Defendant did promise to deliver two woollen cloaths, and the Plaintiff did recover damages for the two. So in Wash, the wash is assigned in succidendo to oaks, upon which they are at Issue, the Jury find but ten oaks, the Plaintiff shall have Judgement for so much, and shall be amerced for the residue, Gawdy Justice. Here are severall Assumpsits in Wash, as Br. 3. Ma. Action sur le Case 108. a man in consideration of a marriage assumes to pay 20 l. per annum for four years, two years incur, the party brings an action upon the case for the arrearages of the two years. Wray in an action upon the Case, the Plaintiff ought not to vary from his Case, as if a promise be grounded upon two considerations, and in an action upon it, the Plaintiff declares upon one only, he shall never have Judgement, and here the Jury have not found the same promise. Clench. If promise be made to deliver a horse and a Cow, and the Horse is delivered, but not the Cow; the party shall have an Action for the Cow, but he shall declare upon the whole matter, and afterwards Judgement was given, quod querens nihil capiat per billam.

Trin. 31. Eliz. In the Kings Bench.

CCCCXI. Stile and Millers Case.

A Parson Leased all his Glebe Lands for years, with all the profits and commodities, rending 13 s. 4.d. pro omnibus exactiobus & demanis, and afterwards libelled in the Spirituall Court against his Lessee for the Tithes thereof, the Lessee obtained a Prohibition, See 32 H. 8. Br. Dis. 17. 8. E. 2. Avowry 212. Wray: Tithes are not things issuing out of Lands, nor any secular duty, but spirituall, and if the Parson doth release to his Parishioner all demands in his Lands, his Tithes thereby are not extint, and afterwards a consultation was granted.

Trin. 31. Eliz. rot. 902. In the Kings Bench.

CCCCXII. Lee and Curetons Case.

Le Debt upon an Obligation, the Defendant pleaded non est factum, and it was found for the Plaintiff, and Judgement given, & afterwards the Defendant brought error, & assigned for error that the Declaration was per scriptum suum obligat. without saying, hic in Curia prolat. to which it was answered by Coke, that the same was but matter of form which a judgement ought not to be reversed, for that the Clerk ought to put in without instruction of the party, and so it was holden in a case betwixt Barras and King, M. 29. and 30 Eliz. Another error was assigned, because the judgement is extint, deinceps nihil quia perdonat. where it should be quod capitatur, although the Plea were pleaded after the generall pardon, and for that cause the Judgement was

Tithes.

Debt.

Error.

was reversed, for if the pardon be not specially pleaded, the Court cannot take notice of it, as it was holden in *Serjeant Harris Case.*

Trin. 31 Eliz. In the Kings Bench.

CCCCXIII. *Lacy and Fishers Case.*

In a Replevin, the taking is supposed in *S.* which Land is holden of the *Hanno* of *Esthall*, the Defendant made *Conulsans*, as *Bailiff* of the *Lord* of the *Hanno* aforesaid, and issue was taken upon the *Tenure*, and it was tried by a Jury, out of the *Vine* of *Esthall* onely, *Tanfield*. The triall triall is not good, for the issue ought not to have been tried by both *Vines*, *S.* and *Esthall*, for two things are in issue. 1. If it be holden, or not. 2. If it be holden of the *Hanno* of *Esthall*, for which cause the *Vine* ought to be from both places, and the opinion of the Court was, That for the manner of it, it was not good, as if an issue be joyned upon common for cause of vicinage, it shall be tried by both *Tenures*, See 39 H.6. 31. by *Littleton* and *Danby*, and the case in 21 E.3.12. was cited in a per que servitia, the *Hanno* was in one county, and the Lands holden in another county, the Tenant pleaded, that he did not hold of the *Conuso*, and that he was tried by a Jury of the county where the Land was, See 2 H.4. *Gawdy* denied he book cited of 21 E.3. to be Law, and the reason wherefore the *Vine* shall come from both places, is because it is most likely, that both the *Vine* may better know the truth of the matter, than the one onely. Another Exception was taken, because the *Conulsans* (as it seems) is made according to the Statute of 21 H.8.19. and yet the party doth not pursue the said Statute through the whole *Conulsans*: for by the Statute in *Abovity* of *Conulsans*, the party needeth not to name any person certain to be Tenant to the Land, &c. nor to make *Abovity* of *Conulsans* upon any person certain; and now in this *Conulsans* he hath not made *Conulsans* upon any person certain, but yet he hath named a person certain to be Tenant, &c. and in as much as this *Conulsans* is not made, either according to the Common Law, or according to the Statute, it cannot be good, but that Exception was disallowed by the Court, for if the Statute remedieith two things, it remedieith one, and the *Conulsans* made in form as above, was well enough by the opinion of the whole Court.

Trin. 31 Eliz. In the Kings Bench.

CCCCXIV. *Diersly and Nevels Case.*

In an Action of *Trespass*, the Defendant pleaded Non-guilty, and if he might give in evidence, That at the time of the *Trespass*, the *freehold* was to such an one, and he as his servant, and by his Commandement entered was the question; and it was said by *Coke*, That the same might so be well enough, and so it was adjudged in *Trivilians Case*; for if he by whose commandement he entreteth hath Right, at the same instant that the Defendant entreteth the Right is in the other, by reason whereof he is not guilty, as to the Plaintiff, and Judgement was given accordingly.

Exposition of
Stat. 31 H.8.
cap. 19.

Mich. 29 and 30 Eliz. rot. 546. In the Kings Bench.

CCCCXV. Savage and Knights Case.

Error.

A Verit of Errour was brought upon a Judgement given in Leicester, in Debt. Tanfield assigned for Errour, because in that suit there was not any Plaintiff, for in all inferior Courts, the Plaintiff is as the Originall at the Common Law, and without that no Processe can issue, and here upon this Record nothing is entered, but onely that the Defendant summonitus fuit, &c. and the first Entrie ought to be, A.B. queritur versus C&c. Clench Justice, a Plaintiff ought to be entered before Processe issued forth, and this Summons which is entered here, is not any Plaintiff, and for that Cause the Judgement was reversed.

Trin. 31 Eliz. In the Kings Bench.

CCCCXVI. Rawlins Case.

If Trespass for breaking his Close by Rawlins, with a continuando. It is moved by Coke, that the Plaintiff needed not to shew a Regresse to have Damages for the continuance of the first Entry, scil. for the mean profit, and that appears by common experience at this day, Gawdy Justice, whatsoever the experience be, I well know that our books are contrary, and that without an Entry he shall not have damages for the continuance, if not in case where the Term or estate of the Plaintiff in the Land be determined, and to such opinion of Gawdy, the whole Court did incline, but they did not resolve the point, because a Regresse was proved, See 20 H. 6. 15. 38. H. 6. 27.

Trin. 31 Eliz. In the King's Bench.

CCCCXVII. Harris and Bakers Case.

Accomp.

Damages.

Collet and An-
drews Case.

If an accompt damages was given by the Jury, and it was noted that damages ought not to have been given by way of damages, but the damages of the Plaintiff shall be considered by way of Arrearages, but see the Case, H. 29 Eliz. in the common Pleas, betwixt Collet and Andrews, and see 10 H. 6. 18. In Accompt the Plaintiff shall count to his damage, but shall not recover damages, vide 2. H. 7. 13. 21 H. 6. 26. The Plaintiff shall not recover damages expressly, but the Court shall adde quoddam incrementum to the Arrearages, Coke, It hath been adjudged, that the Plaintiff shall recover damages ratione implacationis, non Retentionis.

CCCCXVIII. Mich. 32 Eliz. In the Kings Bench.

The words of the Statute of 32 H. 8. cap. 37 of Kents are, that the Executor of a Grantee, of a Rent-charge may distrain for the arrearages of the said Rent incurred in the life of the Testator, so long as the Land charged doth continue in the Seisin or possession of the Tenant in Demesne, who ought immediately to have paid the said Rent so behind to the Testator in his life, or in the Seisin or possession of any other person or persons

sions claiming the said Lands priely by and from the said Tenant, by Pur-
chase, Gift, or Descent, in like manner as the Testator might or ought to
have done in his life time. And now it was moved to the Court. If A
gant a Rent charge to B the Rent is behind, B operh, A infoceth C of the
Lands in fee, who diverse years after infoceth D, who divers years after
infoceth E. It was holden by Walmesley, Periam, and Windham Justice,
against Anderson Lord chief Justice, that E should be chargeable with the
said arrearages to the Executors of A, but they all agreed, That the Lord by
Escheat, Tenant in Dower, or by the courtesy, shold not be charged, so
they do not claim in by the party only, but also by the Law.
See before.

Hil. 32 Eliz. In the Common Pleas

CCCCXIX. Wigot and Clerks Case.

In a Writ of Right by Wigot against Clark for the Pannell of D in
the County of Gloucester, the four Knights gladii circi vid appear, and
took their oar porall Oath, that they would choose 12, &c. ad faciendum mag-
nam Assitam, and by direction of the court they withdrew themselves into
the Exchequer chamber, and there did return in Parchment the names of
the Recognitors, and also their own names, and at the day of the Return of
the Pannell by them made, the 4 Knights and 12 others were sworn to try
the issue, and it was ordered by the court, That both the parties, scil.
the Demandant and the Tenant, or their Attorneys, attend the said 4
Knights in the Exchequer chamber, and to be present at the making of the
Pannell, so as each of them might have their challenges, so after the return
of the Pannell, no challenge lieth, and thereupon the said 4 Knights went
from the Bar, and within a short time after, sitting the court, they return-
ed the Pannell written in Parchment, in this form, Nomini Recognitorum,&c. inter A. petentem, & B tenentem, and so set down their names, six
other Knights, ten Esquires, and four Gentlemen, and the Justices did
commend them for their good and sufficient Pannel, and thereupon a Venire
facias was awarded against the said parties.

Trin. 30 Eliz. rot. 611. In the common Pleas.

CCCCVXX Pory and Allens Case.

The case was, That Lessee for 30 years, leaten for 19 years, and then
the first Lessor, and one B by Articles in writing made between them,
did conclude and agree, That the Lessee for 19 years should have a Lease
for three years in the said Lands and others and that the same should not be
any surrender of his first Term, to which Articles the said Lessee for 19 years did
after agree and assent unto, and it was the opinion of all the Justi-
ces of the court, that the same was not any surrender, and they also were of
opinion, That one Term could not surrender to another Term.

Trin. 31 Eliz. rot. 321 In the common Pleas.

CCCCXXI. Glanvil and Mallary's Case.

Glanvil was Plaintiff in Audit Querela, against Mallary upon a Statute Staple, for that the comys was in chiffrage at the time of the audit, challenging of it, it was moved for the Defendant, that the court ought not
Audit Querela
to

Loves Case.
Dudley and
Skinners Case

to hold Plea of this matter, because there was no Record of the Statute remaining here, and therefore by Law he was compellable to answer it, &c. and a President was shewed s H.8. where such a pleading was allowed, and judgement given, that the Defendant eat fine die, vide 16 Eliz. Dier 332. But on the other side divers presidents were shewed, that divers such Writs had been shewed in the common pleas, as 30 Eliz. Loves case, and the Lord Dudley and Skinners case, and therupon it was adjudged that the Action did well lye in this court.

Mich. 32 Eliz. In the common Pleas.

CCCCXXII. Pet and Callys Case.

Debt.

In Debt upon a Bond for performance of covenants the case was, I S by Indenture covenanted with I D that such a woman, viz. R. S. at all times at the request and charges of I. D. should make, execute, and suffer such reasonable assurances of such Lands to the said I. D. or his heirs as the said I. D. or his heirs should reasonably devise or require, I D devised a Fine to be levied by the said Woman, and required her to come before the Justices of assise to acknowledge it, and the woman came before the said Justice to that intent, and because the said woman at that time was not compos mentis, the said Justice did refuse to take the Confusans of the said Fine, & this was a verredin pleading in an action brought upon the said Bond for performance of Covenants, where the breach was assigned in the not acknowledging of the said Fine, and upon the speciall matter the party did demur in Law, and the opinion of the whole Court was, that the condition was not broken, for the woxes are generall to make such reasonable assurances which, &c. but if the woxes had been speciall to acknowledge a Fine, there is the Justice both refuse to take such acknowledgement, the Bond is forfeited, so the party hath taken upon him that it should be done.

Mich. 22 Eliz. In the common Pleas.

Wangford and Sextons Case.

Executions.

The Plaintiff had recovered against the Defendant in an action of Debt and had execution: The Defendant after the day of the Teste of the Fieri facias, and before the Sheriff had meddled with the execution of the Writ, bona fide for money sold certain goods and chattels, and delivered them to the buyers; it was holden by the Court, that notwithstanding the said Sale, that the Sheriff might do execution of those goods in the hands of the buyers, for that they are liable to the execution, and execution once granted or made shall have relation to the Teste of the Writ.

Trin. 29 Eliz. rot. 27. 15. In the common Pleas.

CCCCXXIV. Wilmer and Oldfields Case.

Award.

In Debt upon a Bond, the Condition was to perform the Award of I.S. &c. the Arbitrators make Award, That the Defendant before such a day shall pay to the Plaintiff 1000l, or otherwise procure one A, being a stranger to the Bond to be bound to the Oblige for the payment of 12 l. per annum to the plaintiff for his life, the Defendant pleaded the performance of the Award generally

generally, the Plaintiff assigned the breach of the award in this, That the said A had not payd the said 100 l. without speaking of the cause of the award of the 12 l. per annum, upon which the Defendant did demur in law; it was holden by the whole Court, that the Replication was good, for the Award, as to the second point was merely void, as if no such Award at all had been, because A was a stranger to the Award and the submission, but as to the point of the 100 l. the same is good, and shall bind the parties, and the plaintiff had Judgement to recover, vide 21 E.4.75.18 E.4.22,23.

Mich. 31, and 32: Eliz. rot. 814. In the common pleas.

CCCCXXV. Fabian and Windsors *Case.*

I. & Trespass for entring into his house or Inne at Uxbridge, it was found by Imperial verdict, That the plaintiff leased to the Defendant the said house for Leases, seven years, rending Rent at the Feasts of the Annunciation of our Lady and Saint Michael, &c. with condition, that if the said Rent shall be behind by the space of ten dayes, &c. that it shall be lawfull to the Lessor to re-enter: And afterwards at the Feast of the Annunciation, 31 Eliz. the Rent was behind, and the tenth day after the Lessor came to the said House a quarter of an hour before the sun setting and demanded the rent in these words, I demand three pound ten shillings for a halfe years rent of this House now due, and there continued untill the sun was set, but no rent was paid: But note, that the Issue was, If he came to the House halfe an hour before sun set, and there continued demanding the halfe years rent of the Premises due at the Feast of the Annunciation of our Lady then last past: It was moved by Fenger, That upon this Verdict the Issue is not sound for the Plaintiff, i. the Issue was upon the halfe hours, & the quarter part of the houre was found, 2. the Issue was, If the demand were of the Rent due at the Feast of the Annunciation passed, and the Verdict is for rent due at the time of the demand, &c. And it was the opinion of Anderson, Periam, and Walmesley, Demand of Rent, That as to the first point the Verdict was good enough for the Plaintiff: Windham contrary: But it was agreed by them all, That if in demand of rent (ut supra) the Lessor, or any on his part doth demand one penny more or lesse then is due, or in his demand doth not shew the certainty of the rent, Conditions and the day of payment of it, and when it was due, the demand is not good, taken strictly for a condition which goes in defeasance of an estate is odious in Law, and no re-entry in such Case shall be given, unless the demand be precisely and strictly followed.

Mich. 32: Eliz. in the common Pleas.

CCCCXXV. Elmes and Medcalfes *Case.*

It was holden for Law by the whole Court, That if one of the witnesses after the Jury are departed from the Bar, doth repeat unto the Jury the same Evidence which he gave before and no moze, That that doth make the Verdict to be void.

A.D. 32 & 33 Eliz. In the common Pleas.

CCCCXXVII. Carter and Claycoles Case.

Leases.

In Ejectione firmie by Carter against Claycole, the Plaintiff declared upon a Lease made by the Wardens and Fellowes of All-soules Colledge, 1. July, 10 Eliz. And it was found by speciall Verdit, That Overden War- den of the said Colledge, and the Fellows, &c. leased unto the Plaintiff, To have and to hold from the Feast of the Annunciation next following, to the end of twenty years, and made a letter of Attorney to one, to enter into the said Parcies, and to seal and deliver the Deed of the said Lease in their names to the Plaintiff, who by force thereof entered into part of the demised Premises, and there did seal and deliver the same, &c. But it was not found that any rent was reserved thereupon; And if this Lease were good, Then the Jury found for the Plaintiff, but if not, then for the Defendant: Cooper Sergeant. It hath been objected, That this Lease being but in twenty years, is not warranted by the Statute of 13 Eliz. Cap. 10. For the words of the Statute are, Other then for the term of 21. years, as to that, It was not the intent of the Statute, but only to abridge the great and long Leases heretofore made by Colleges, and to limit such Leases to a certain measure of time, ut supra, for twenty one years or three lives, & non ultra, but on this side as much as they would, which was granted by the whols Court: Another matter was because it is not found, That the due rent was reserved upon the said Lease (as accustomed yearly rent or more) and yet the same is good enough, for if the other party will take advantage of such defect he ought to shew the same, otherwise it shall be intended, because it is found that such Lease was good; that it was made according to the Statute: For if a man is to make title to himself by a conditional Lease, he is not to plead the condition, but only the Lease and if the other party will defective the Lease by the Condition, he shall shew the same: And in this Case, The Defendant also ought to have shewed the Statute, by which such defective Leases are made void: Also it hath been objected, That by the Statute of 13 Eliz. The third part of the rent ought to be reserved in Cossis, and here is not found any Cossis, as to that, It is to be considered, That the said Statute is not a generall Law, whereof the Judges are bounden to take notice, but it ought to be pleaded, for it extends but to four places, viz. Cambridge, Oxford, Winchester, and Exon, and therefore such a Statute ought to be pleaded, or given in Evidence, and found by Verdit: As where a man pleads a generall pardon, in which divers persons are excepted, he ought to plead it specially, and shew, that he is not any of the persons excepted, 8 E. 4. 7. 28 H. 7. So speciall customes ought to be pleaded, Gavelkind, Borough English, 21 E. 4. 33. 36. The King grants to the Citizens of Norwich, &c. And afterwards by act of Parliament, all their Liberties, &c. are confirmed by a general confirmation to all Cities and Boroughs, this is a speciall act, and ought to be pleaded, by Brian, 59, 13 E. 4. 8. The Lord Sares case, an act of Parliament, That all Corporations made by the King, H. 6. shall be void, is a speciall act, and ought to be pleaded: And see 28 H. 8. 27. & 28. Dyer. If the Statute of 21 H. 8. cap. 13 Of Lands taken to Ferme by Clericall persons by a speciall Law: Yelverton contrary; The Statute of 13 Eliz. is a speciall Law and ought to be pleaded, but the Statute of 13 Eliz. is a generall Law which now see Hollands case, 29 Eliz. and Dampiers case, 45 Eliz. And this act of 13 Eliz. is generall in respect of time, for it extendeth to all time after (from henceforth) and to all persons to whom such Leases shall be made, the words of the Statute are, scil. To any person or persons

Speciall Sca-
cuses ought to
be pleaded.

persons, in respect of persons who shall lease, all spirituall persons : Generall in respect of the ent, which is the maintenance of learning, which extends to the common profit, &c. Drew Serjeant, That this act of 13 Eliz. is generall in respect of restraint only, but extends only to spirituall persons, and therefore ought to be pleaded, for otherwise the Court shall not take notice of it. As the Statute of 21 H. 6. of Sheriffs ought to be pleaded, which see in the Case of Dive and Manningham, Plowden, 64, 65. And although the Statute ought not to be pleaded, Yet this Lease is not void against the Warden who made it, but against his Successor, although no rent be reserved upon it, notwithstanding that the preamble of the Statute be (utterly void and of none effect, to all intents, constructions, and purposes) So upon the Statute of 1 Eliz. concerning Leases made by Bishops, the Law hath beene so taken in the case of the Bishop of Coventry and Leichfield upon a Grant of the next Aboydance. That although it doth not bind the Successors, yet it shall bind the Grantor himselfe : So here this Lease being made by the present Warden and Fellowes of the Colledge aforesaid, although it be not sufficient to bind the Successor, yet it shall bind the Warden who made the Lease, Puckering contrary. And as to the case of 13 E. 4. 8. the reason there is, because there is an Exception in the said Statute of divers Grants made by King H. 6. and therefore the said Act ought to be specially pleaded : And see 34 H. 6. 34. by Pisoic : But in this Act of 13 Eliz. there is not any Exception, and although it be a generall Act with a Restraint, yet such an Act ought not to be pleaded, and therefore 27 H. 8. 23. In an action upon the Statute of 21 H. 8. for taking of Lands to Farme by spirituall persons, he need not make mention of the Statute : And afterwards the Justices did advise upon this point, whether the Lease be so void, That it be void against a stranger : So as the Defendant who doth not claime under the Colledge, and who hath no title to the Land may avoid it. And Periam Justice denied the Case put by Puckering : A mortgages Lands to B upon a usurous contract for one hundred pounds, and before the day of payment B is ousted by C against whom B brings an Action, C cannot plead the Statute of Usury, for he hath no title : For the estate is void against the Mortgagor. Another Exception was taken to the Declaration, because the Plaintiff hath declared, upon a Lease by the Warden and Fellowes, without naming any name of the Warden, 13 E. 4. 8. 18 E. 4. 8. In Trespass the Defendant doth justifie, because that the Free-hold was in the Dean and Chapter, and he as Servant, and by their commandment entered; And Exception was taken to that Plea, because he hath not shewed the name of the Dean, scil. the proper name : So if a Lease be made by Dean and Chapter in these words, Nos Decan. & Capituli, the same Lease is void, which was granted by the Court : and 12 H. 4. 251. A Provost granted an Annuity by the name of Provost of such a Colledge, without any name of Baptisme, and afterwards, the Canteen brought a writ of Annuity against the Successor of the said Provost ; and by Hull, The writ is well enough, but the Christian name ought to be set down in the writ : So here, because that the name of Baptisme of the Warden is not in the Declaration, the same is not good : But the opinion of the whole Court was, That the Declaration is good enough, and they did rely especially upon the Book of 21 E. 4. 15. 16. Where Debt is brought by the Dean and Chapter without any Christian name, and the writ holden good : Anderson : It stands with reason, That soz as much as the Colledge was incorporated by the name of Warden and Fellowes, and not by any Christian name that they may purchase, and lease by such name without any Christian name, and may be impleaded, and implead others by such name, and as the Fellowes in such case need not to be named by their Christian names, no more ought the Warden : But of a Parson, Vicar, Chauncery Preist, it is otherwise, for in such case the name of Baptisme ought to be added :

ded: It was also objected, That because the Letter of Attorney was to enter in the Manors, and all the Lands and Tenements of the Colledge in such a Towne, and to seal the Indenture of Lease in the name of the Lessors, and to deliver it to the Plaintiff as their Deed, now the Attorney in executing of this warrant hath not pursued it, for he hath only entered into the Lands, but it is not found, that he entred into the Manors, and so the Lease is void: And it was said by Puckering, That if I lease two Acres in two severall Countys, rendering for the one Acre ten shillings, and for the other Acre ten shillings, and make a Letter of Attorney to make Libery in both, if the Attorney stretches into one Acre, and makes Libery, the same is void, for the Attorney hath not pursued his authority, for peradventure I would not have leased the Acre whereof Libery is made for such rent of ten shillings, being perhaps of greater value, but with the other Acre which was of lesser value, and so the misexecuting of my warrant shall prejude me: Windham, Perhaps if one entire Rent had been reserved out of both Acres, it may be that by the Libery in one Acre, all is void; But by Puckering one entire Rent cannot be reserved upon such a Lease of two Acres in severall Countys: Walmesley denied the Lease put by Puckering, for the authority is executed well enough, for it doth not appear upon the Verdict, but that the Colledge was in possession at the time of the Lease made, and then there needed not any such Entry, but the bare sealing and delivery of the Attorney is good enough: And also it doth not appear by Verdict, That the Colledge hath any Manors, and therefore, it shall be so intended, and then the case is no other but that, A man leaseth a Manor, and certain Lands in D, and makes a Letter of Attorney to make Libery of them, where he hath nothing in the Manors, and the Attorney makes Libery of the Land without meddling with the Manors, the same is a good Libery, and the authority duly executed: But if it has been expressly found, that the Colledge has such a Manors there, then the Entry in the Land only, without meddling with the Manors, and the Libery made accordingly should not be good: But yet afterwards he seemed to be of other opinion. And as to that which hath been objected, That the Lease is void to all intents and purposes according to the words of the Statute (for by some it cannot be resembled to the case cited before, of the Bishop of Coventry and Leichfield, that such a Grant should bind him and not his Successors) for if this Grant in our Case shall not be void presently, it shall never be void; for the College never dyeth, no more then Dean and Chapter, Parson & Commonalty: to that it was answered by Drew, That although there be some difference betwixt such Corporations, & that the words of the Statute are generall (void to all intents, constructions, & purposes) yet they shall be construed according to the meaning of the makers of the Act, whose scope was to provide for the Successors, and not for the present Incumbent, and to the utter impoverishing of all Successors, without any respect to the party himself, as it appeareth by the preamble of the said Statute, where it is observed, That by long and unreasonable Leases, the decay of spirituall livings is procured, for the remedying, and preventing of which long Leases this Act was made, and that the Successors should not be bound thereby: And these Leases are not void, simpliciter sed secundum quid s. c. as to the Successors: As upon the Statute of 11 H. 7. cap. 20. Discontinuances made by weomen, &c. shall be void and of none effect, yet such a Discontinuance made is good against the woman her selfe: So upon the Statute of 1 Eliz. concerning Bishops; See now Coke, Lincolne College Case, 37 Eliz. in the three Reports, 60. A Lease made by Dean and Chapter not warranted by the said Statute, shall not be void untill after the death of the Dean who was party to the Lease: So upon the Statute of 13 Eliz. of fraudulent Conveyances, such fraudulent Conveyance is not void against the Grantees, but against those who are prohibited by the said Statute, and that the Lease in the principall case is not void but

but voidable, all the Justices agreed to be avoided by the Colledge, or any other who claim by it, and by Anderson, if such a Lease should be void, then great mischief would fall to the Colledge for whose benefit this Statute was made, for if such Lease be made rendering a small Rent, then if before the debt be sound or espyed, the Rent was arrear, the Colledge could not have remedy for the said Rent: Also by Periam, such a Lessor might have an Action of Trespass against a Stranger, who entreteth upon the Land, which proves that the Lease is not void, but voidable, and afterwards notwithstanding all the Objections, Judgement was given for the plaintiff, and the chief authority, which moved Periam Justice to be of such opinion, was Lemans case cited before, 28 H.8. Dyer 27. where a Lease was made to a spiritual person against the Statute of 21 H.8. and a Bond or Obligation for performance of covenants, and thereupon an Action was brought, and the plaintiff therein had Judgement and recovered, which could not have been if the Lease were utterly void against the Lessor and Lessee, as the very words of the Statute are, and although it is not alledged in the book, that that was any cause of the Judgement, yet in his opinion it was the greatest cause of the Judgement in that case.

Pasch. 35 Eliz. In the common pleas.

CCCCXXVIII. Bighton and Sawles Case.

In an Action upon the case, it was agreed by the whole Court, That where Judgement is given, that the plaintiff shall recover, and because it is not known what damages, therefore a Bill is sued to enquire of the damages, That the same is not a per se Judgement before the damages returned and adjudged, and therefore they also agreed, that after such award, & before the damages adjudged that any matter might be shewed in Court in arrest of the Judgement and by Periam Justice, the difference is, where damages are the principall thing to be recovered, and where not: for if damages be the principall, then the full Judgement is not given until they be returned, but in Debt where a certain sum is demanded it is otherwise.

Pasch. 33 Eliz. In the common Pleas.

CCCCXXIX. Maidwell and Andrews Case.

Maidwell brought an Action of Covenant against Andrews, and the Case Covenants was this, That R. was seised of Lands, and leased the same for life, tenning Kent; and afterwards devised the Reversion to his wife for life, and died, Andrews the Defendant took to wife the wife of the Devisor, the Devisee of the Reversion, afterwards Andrews bargained and sold the said Reversion to one Marland and his heirs during his own life, and afterwards granted the Kent to the Plaintiff, and covenanted that the plaintiff should enjoy the said Kent during his Term, absque aliquo legitimo impedimento of the said Andrews his Heirs or assigns, or any other person, claiming from the said Marland. Marland died seised, and the same descended to B. his heir, and the breach of the Covenant was assigned, in this, i. in the heir of Marland, who hath the Kent by reason of the Grant of the Reversion to Marland ut supra, the Defendant pleaded the Grant of the Reversion to Marland, per scriptum (without saying, Sigillo suo sigillat, & hic in Cuxia prolat.) absque hoc, that the said Reversion and Kent descended to B. and thereupon the plaintiff did demur in Law, and the causes of the Demur were assigned by Yelverton Serjeant. 1. The Grant of the Reversion

Traverse.

Vernon and
Grayes Case.

is pleaded per scriptum, and he doth not say (sigillat.) for a Reversion can not passe without Deed, although it be granted but for years, and a bare writing is not a Deed without sealing of it, and therefore the pleading ought to be per scriptum sicut signat. or per factum sicutum, for factum sicutum implies the ensigning and deliverie. 2. It ought to be pleaded hoc in Cur. prolat. for the Court is to see such Deeds, to the end they may know, if it be a lawfull Deed, without rasure, interchanging or other defects. 3. The Defendant hath traversed the Descent, where he ought to have traversed the dying seised, for of every thing descendable, the dying seised is the substance, and the Descent is but the effect: And although the Grant of the Reversion was but for the life of the Grantor, yet the estate granted is descendable, as 27 E. 3. 31. Tenant by the Consettis leaseth his estate to one and his heirs, the Grantor dieth, his Heir entreth, and a good Bar against him in the Reversion, and see 14 E. 3. Action 36. Annuity granted to one and his Heirs for the term of another mans life, the Grantor dieth, living Cestuy que use, the Heir of the Grantor brings a writ of annuity, and it was holden Paintable, and he said, that where the dying seised is confessed and avoided by the other side, there the Descent is traversable, and not the dying seised, and that was the Case betwixt Vernon and Gray. In an Abovwy Vernon conveyed the Land from the Lord Powes, to him as next Heir to him, because the Lord Powes died seised in his Demesne as of Fee without issue, and the Plaintiff conveyed from the said Lord Powes by Devise, and traversed the Descent to the Abowant, for the dying seised was confessed and avoided by the Devise, 22 Eliz. Dyer 366. See 21 H. 7. 31. In Trespass the Defendant saith, That I was seised, and dyed seised, and that the Land descended to him as Son and Heir, and that he entred, the Plaintiff said That I was seised, and took to wife K, and they had issue the Plaintiff, and were seised, and the Land descended to him, and traversed the Descent to the Defendant, and see Sir William Merlings Case, 14 H. 8. 22, 23. But if the parties do not claim by one and the same person, or the dying seised be not confessed and avoided, there the dying seised shall be traversed, and not the Descent. Glanvil Serjeant, Be the Bar insufficient or not, if the Declaration be not sufficient, the Plaintiff shall not have Judgement, and here is not any breach of Covenant, viz. that the Plaintiff shall enjoy it, without any lawfull impediment of the Defendant, his Heirs or Assignees, or any claiming by Marland, and then if the Heir of Marland cannot make any lawfull claim, then there is not any breach of Covenant assigned, and he said because it is not shewed, that the Land is not holden in Socage, the Devise is not good, for it may be that the Land is holden in Capite: but admit the Devise good, that when Andrews bargains and sells unto Marland, and the Tenant never returns, then nothing passeth, and then the Heir of Marland cannot make any lawfull claim or lawfull impediment. Periam Justice, Here Marland was assignee of Andrews, and if he or his Heir make claim, although that the assignment be not sufficient in Law, yet because he hath colour by this assignment, his claim is lawfull, and so there is a breach of the Covenant, and although it is not alledged, that the Land devised, is holden in Socage, yet the Devise is good for two parts of the Land. Anderson Justice, If it be good but for two parts, then is the Reversion apportioned, & the Rent destroyed, and so Marland hath not any Rent by his purchase of the Reversion, and so he cannot lawfully distrain the Plaintiff, the Law doth create his apportionment, which grows by the Devise, and therefore the Rent shall not be destroyed, but if it had been done by the Act of the party, it had been otherwise, and I would willingly hear, if the Heir of Marland be assignee of Andrews, for otherwise he is not within the words of the Covenant, for Marland hath an estate to him and his Heirs for the life of another: now after the death of Marland, his Heir is a speciall occupant, and

vide

v. H. 26 Eliz. Rot. 560. in the Common Pleas, such an Heire shall not have his age.

Pascb. 33 Eliz. In the common Pleas.

CCCCXXX. Oglethorpe and Hides Case.

In Debt upon a Bond for the performance of Covenants, it was holden by the whole Court, That if the Defendant pleaded generally, the performance of the Covenants, and the Plaintiff doth demur generally upon it without shewing cause of Demurrer; Judgement shall be given according to the truth of the cause, for that default in pleading is but matter of forme, and is aided by the Statute of 27 Eliz. But if any of the Covenants be in the disjunctive, so as it is in the Election of the Covenantes to doe the one or the other, then it ought to be specially pleaded, and the performance of it, for otherwise, the Court cannot know what part hath been performed.

Micb. 32 Eliz. In the common Pleas.

CCCCXXI. Tracy and Ives Case.

In Debt by Margaret Tracy against Ives, the Case was, That John Finch Dower, was seized and enfeoffed Shipton and others of two parts of the Lands to the use of himselfe and the Defendant his then wife, and their heirs for ever, with Condition, That if his said wife did suruive him, she should pay such sums of mony not exceeding two hundred pounds, to such persons which the Testator by his last will should appoint, and afterwards he declared his Will, and thereby appointed certain summs of mony to be paid to divers persons, amounting in the whole to the sum of one hundred and fifty one pounds, and by his said Will devised the residue of his Lands to divers of his kindred, having no issue, and dyed, The wife married Tracy, and they brought Dower against the Devisees, who pleaded the Feoffment aforesaid, and aversed the same was made for the Joynture of the Demandant; And because that no other matter or circumstance was proved to verifie the Averment, the Court incited the Jury to find for the Demandant, which they did accordingly.

Micb. 32 Eliz. In the Common Pleas.

CCCCXXII. Bond and Richardsons Case.

In Debt upon a Bond, the Condition was to pay a lesser sum such a day, and at such a place, the Defendant pleaded payment according to the Condition, upon which they were at issue; And it was found by Verdict, That the lesser sum was paid such a day before the day contained in the Condition of the Bond, and then received, and upon this Verdict Judgement was given for the Plaintiff, for the day is not materiall, nor the place, but the payment is the substance.

Trin. 32 Eliz. In the common Pleas.

CCCCXXXIII. Marshes *Cafe.*

Trover and
Conveyance.

Goods came to a Feme covert by Trover, and she and her Husband did convert them to their own use, it was holden per Curiam, That the Action upon the Case, shall be brought against the Husband & Wife, and not against the Husband only, for the Action doth sound in Trespass, and it is not like unto Detinue, for upon a Detainer by the Wife, the Action lyeth, against the Husband only.

Trin. 32 Eliz. In the common Pleas.

CCCCXXXIV. Corbets *Cafe.*

Debt.

An Action of Debt was brought by Original Wit against an Administratoz in another County, then where the Administratoz was committant, and before notice of the suit, he paid divers debts of the Intestate due by specialty, and so he had not Assets to pay the debt in demand, having Assets at the day of the Teste of the Original; And now, the Defendant appearing, pleaded this speciall matter, and concluded, so he had nothing remaining in his hands: And it was holden per Curiam, to be a good Plea,
See 2 H. 4. 21. 23.

Pleintment
Administered.

Mich. 32 Eliz. In the common Pleas.

CCCCXXXV. Gillam and Lovelaces *Cafe.*

Administration.

Katherine Gillam, Administratrix of John Gillam brought Ejectione from against Leohard Lovelace, and upon not guilty pleaded, It was som for the Plaintiff; It was moved for the Defendant in arrest of Judgement, That the Declaration was not good because the granting of Letters of Administration is set forth in this manner, viz. Administratio commissaria Querenti per Willielmum Lewen Vicarium generalem in spiritualibus Epi. Rot. without averring, that at the time of the granting of the Letters of Administration, the Bishop was in remotia agendis, for a Bishop present in England cannot have Vicarium: But as to that, It was laid by the whole Court, That the Vicar generall in Spiritualibus, amounts to a Chancellor, for in truth the Chancellor is Vicar generall to the Bishop: Another Exception was, because the Declaration is not Epi. Rot. loci illius ordinarij, but that was not allowed, for all the Presidents, and the course of the Court is, That by way of Declaration such allegation needs not, but by way of Bar it is necessary: Another Exception was taken, because the Plaintiff hath declared of an Ejectment, and also, quod bona & catalla ibidem invent. cepit, &c. And here, in the Verdict, the damages, as well for the Ejectment, as for the Goods and Chattells, are entirely taxed: It was adjoined.

Mich 32. Eliz. In the commou Pleas.

CCCCXXXVI. *Greeves Case.*

In a Replevin, the Defendant made Consuls of Bayliff to one Greeves and Rockwood, &c. and said, That A was seised of the Lands, and at Eliz. Replevin, enfeoffed certain persons in fee to the use of his last Will, by which he willed, that his Feoffees should stand seised of the said Lands, until the said Greeves had levied of the profits of the said Lands, the sum of one hundred pounds: It was objected against this Consuls, that here is no devise, for A at the time of the devise had not any Feoffees, but the Exception was disallowed by the Court: And they cited the case of 15 Eliz. Dyer, 323. Lingen's case, A made a Feoffment in fee to his use, and afterwards devised that his Feoffees should be seised to the use of his Daughter, that the same was a good devise of the Land: See 29 H. 8. Br. Devises, 48.

Devises.

Mich. 31 & 32 Eliz. In the common Pleas.

CCCCXXXVII. *Kempton and Coopers Case.*

In Trespass for breaking of his Close, the Defendant pleaded, that before this he had brought an Ejectione firmæ against the now Plaintiff and recovered, and had execution, &c. Judgment is Action, &c. And by Periam, Windham and Anderson Justices, the same is a good Bar, and the conclusion of the Plea is also good, Judgement is Action, without relying upon the Estoppel.

Mich. 32. Eliz. In the Kings Bench.

CCCCXXXVIII. *Leigh and Okeley and Christmas Case.*

Oliphe Leigh Fermor of the Queen of a Wood called Meerherft Wood in Warpsden in the County of Surrey, brought an Action of Trespass against Henry Okeley and Robert Christmas for breaking of the said Wood, and therein entring and cutting down of two hundred loads of Wood, and carrying away the same, &c. The Defendants pleaded, And before the time in which the Trespass was supposed, &c. That King H. 8. was seised of the Manor of Warpsden, whereof the said Wood was parcell of which Manor a Close called Withybod containing eleven Acres, eidem bosco adjacent. Custom, was parcell, and that the said Wood is, and time out of mind, &c. was closed and seperated with Hedges and Ditches, from the said eleven Acres which said Hedge and Ditches, per totum tempus predict. fuerunt & ad hoc sunt predict bosco spectant, & pertinent. And that the said eleven Acres are, and time out of mind were customary Lands parcell of the Manors aforesaid, and demised and demisable in Fee simple; And that the said King H. 8. at a Court holden, 38 H. 8. by his Steward demised the said eleven Acres by copy, to John Goring and his Heirs, and that within the said Manors there is this Custom, That every Copyholder, Tenant of the said eleven Acres, &c. have used and accustomed, per se vel servientes suos per eorum præcept. succidere, capere, & asportare subboscum in predict. bosco in quo &c. pro reparatione predictorum sepium & defensionum inter predict. boscum in quo, &c. and the said eleven Acres, &c. quondamque exdein sepes & defensiones in decasu extiterint, and shewed further, That at the time of

the Trespass, &c. the said Hedges and Fences were in decay, and so justified: Upon which the Plaintiff did demur in Law: It was argued by Godfrey, That the Prescription is not good, soz it appeareth, That this customary Land is contigue adjacent, to the said Wood, i. where the Trespass was done: And of common Right the making of the Hedge doth appertain to the Owner of the Wood: And the Prescription is no more, but to take wood in the Lands of another, adjoining to my Land to make the Hedges of the same Land in which the wood groweth, which cannot be a good Prescription, for it sounds in charge, and not to the profit of him who prescribes: Which see 22 E. 3. Prescription, 40. Trespass against an Abbot, because where the Plaintiff was Farmer of the King of his Hundred of D. and by reason thereof he might make Attachment and distraine for the debts of the King within the said Hundred, and where for a certain debt the King he distrained the Beasts of one A. and the Abbot made Recouers, to which the Abbot said, That he was Lord of the Manor of D, within which Manor there was this custome, &c. That if any Distresse be taken within the said Manor, that the same shoulde be put into the Pound of the said Abbot of the same Manor, and not driven out of the Manor, and there ought the Distresse to remain three dayes, so that if the party would agree within the three dayes, that then he shoulde have his Beasts, and he said, That the Plaintiff would have driven the said Beasts out of the said Manor, and that he would not suffer him, upon which there was a demurrer, because it is not any profit to the Abbot but a charge to keep the Beasts of another: Also he said, That the King shall not be bound by such a custome as another person shall, whereupon Judgement was given for the Plaintiff: So here in the principall case, There shall be no damage to the Defendant if the wood be not fenced, so if his Cattell escape into the wood, he may suffice it, because it is in default of the Plaintiffs inclosure: And if the Beasts of the Plaintiff escape into the Lands of the Defendant, he may take them Damage Feasant, so if his Cattell escape into the wood, he may suffice it, because it is in default of the Plaintiff's inclosure, 21 H. 7. 20. A Custome is pleaded, That if any Tenants of the Manor shall take the Cattle of any one Damage Feasant, and shall therefore distract them, that then the Tenant so distracting them ought to bring them to the Lord's Pound, which if he shall not doe, at the next Court, he shall be amerced in a certaine sum, to the Lord of the Manor to be paid, and that was holden no good custome because it is against common right, and the common Law, for by the common Law, and common reason, every one finding Cattell in his own Lands Damage Feasant, may impound them in his own Land, and the Lord is not damned thereby: So it is of a By-law, That every one who holdeth so many Acres of Lands in such a Towne, shall yearly pay a certaine sum of money to the Church of the same Towne, and shall forfeit for every default of payment thereof twenty pounds, such By-law, although it hath continued time out of mind, yet it is not of any validity, because for not payment of the said sum to the Church, the Lord of the Manor is not damned, and therfore he shall not have any gaine, contrary if the penalty had been limited to the Churchwardens, because they are bound to repaire the Church. Another Exception was taken to the forme of the Prescription (Quodocunque eadem sepes & defensiones in decasu extiterint) and that is too generall, soz so they might be in decay by his own default, as if he himselfe wrongfully pull up the Hedges, in which case, there is no reason but that he should repaire them at his own costs, and charges, and therfore he ought to have pleaded, cum in decasu extiterint in the default of the Tenant of the wood. Another Exception was taken because that here this custom is pleaded particularly, & appropriated to the eleven Acres only, and is not extended to the whole Manor, and to that purpose, the case of 40 E. 3. 27. was cited where a custome is applied to one part of a Towne, as to say that such a hook within

within such a Towne is of the nature of Gavelkind, and the rest of the Towne is guiltyable: See 21 Eliz. Dyer, 363. It was adscorned, &c.

Hill 20 Eliz. In the Common Pleas.

CCCCXXXIX. Hare and Okelies Case.

Michael Hare, and others, brought an Action of Trespass against Okelie for breaking of their close, and carrying away of their corn; And upon Trespass, it was found by speciall Verdit, That the said Michael Hare was sole seised of the said Close where, &c. & so seised, exposit ad culturam, anglice, did put forth to Tillage the said Land to the other Plaintiffs in form following, viz: That the said Michael shoulde find one halfe of the corn sowne, and the other Plaintiff the other halfe, and that the said Land shoulde be ploughed & tilled, and the Corn thereof coming shoulde be reaped and cut, at the charges of the other Plaintiffs and so cut shoulde be divided by the shock, and the said Michael to have the one halfe, and the other Plaintiff the other halfe, &c. And it was the opinion of the whole Court, That notwithstanding these words (exposit ad culturam) that no estate in the sole Exposition of passed to the other Plaintiffs, but the said Michael did remaine sole seised as words. before, but by Anderson, upon the severance of the Corns, peradventure a property in the said Corn might be in all the Plaintiffs: But because it ap- peareth, That Michael was sole seised and the other Plaintiff had not any thing in the Land: Therefore it was adjudged that they could not joyne in the Action of Trespass for breaking of the Close, and therefore it was awar- ded by the Court, that the Plaintiff nihil cap. per brevium.

Trin. 30 Eliz. In the Common Pleas.

CCCCXL. Beares Case.

In a Formdon by Beare, the Defendant pleaded in Bar, a warranty with Assets; And upon the Issue nothing by dissent, it was found, That the Ancesto^r of the Defendant whose warranty was pleaded in Bar, was possessor of Land in the nature of Gavelkind, and by his will devised the same to his two Sons (whereof the Defendant was the Eldest), and their heirs equally between them to be divided, and it was adjudged no Assets, wherefore the De- fendant had Judgment to have seisin of the Land.

Pasc. 30 Eliz. In the Kings Bench.

CCCCXLI. Austin and Smiths Case.

The Case was, That Austin being a Copy-holder by License of the Lord leased his Copy-hold to Smith for years rendering rent, and afterwards by Deed granted the rent to another, to have during the Term, &c. to which Grant the Lessee did affirme and payd the Rent to the Grantee: It was holden by Gawdy Justice, That the Grant was good, but now it is but a Kent-lease: And it is said by some, That the Lessor cannot surrender such a Rent, unlesse he surrenders the Reversion also: Quere, if the Grantee may have an Action of Debt for it: It was conceived he could not, for he is not party nor privy to the Contract, nor hath the Reversion.

Copy-holder
of Grants.

Rents.

Pasc. 31 Eliz. In the Kings Bench.

CCCCXLII. Underhill and Savages Case.

Pluralities.

Prohibition.

Archdeaconry

Savage was presented to a Benefice, and afterwards was presented to another, and then purchased a Dispensation (which was too late) and then was qualified, and afterwards accepted the Archdeaconry of Gloucester, and Underhill who had the Archdeaconry libelled in the Spirituall Court against the said Savage, where it is holden that all Ecclesiastical promotions in such cases are void, & now Savage sued a Prohibition. It was argued by Atkinson, That the Prohibition doth lie, for the Patron hath his Remedy by one Law, by a writ of Right of Abatement, see 29 E. 3. 44. If Abatement be by Cessation or deprivation, and the next presentation come in question, it shall be determined by the Kings Court, and here when he accepteth of another Benefice, it is cession by the Common-Law, but there ought to be a sentence, but now there needs not any sentence, for by the Statute of 21 H. 8. 13. the Church is ipso facto void. But it was objected, an Archdeaconry, is not within the Statute, for it is not any Cure with Souls: also an Archdeaconry is a late promotion, and therfore it cannot be void by the Statute, Lewknor contra. The Patronage here doth not come in debate, but if the Defendant in the Spirituall Court will plead, That the Plaintiff is not Patron, but such an one, then a Prohibition lieth: withhold the Benefices granted, and it was said by Wray, that a Doctor of the Civil Law hath been with him, and affirmed to him, that their Law is, That if one having a Benefice with cure of Souls accepts an Archdeaconry, the Archdeaconry is void, but he said, that he conceived, that upon the Statute of 21 H. 8. the Law is qualified by reason of a proviso there, scil. Provided that no Deanry, Archdeaconry, &c. be taken or comprehended under the name of a Benefice, having Cure of Souls, in any Article above specified.

Award.

CCCCXLIII. Pasc. 30 Eliz. In the Kings Bench.

He was bounden to stand to the award of two arbitrators, who award that the party shall pay unto a stranger or his assigns 200 l. before such a day, the stranger before the day dieth, and it takes Letters of Administration, and if the obligor shall pay the money to the Administrator, or that the obligor should be discharged w^t the Question, and it was the opinion of the whole Court, that the money should be paid to the Administrator, for he is assignee: and by Gaudy Justice, if the said assignee had been left out, yet the payment ought to be made to the administrator, quod Coke affirmavit.

CCCCXLIV. Pasc. 30 Eliz. In the Kings Bench.

Steward.

He sued in the Kings Bench for Costs given upon a Suit depending in the Hundred Court, the sum of the Costs was under 40 s. and the Plaintiff declared, That at the Court holden before the Steward, secundum consuetudinem Manerii predict. It was objected that the Steward is not judge in such Court, but the Suitors, to which it was answered by the Justices, that by a Custome in a Hundred Court a Steward may be Judge, and so it hath been holden, and here the Plaintiff hath declared upon the Custome, for the Declaration is secund. consuetudinem Manerii, also the Subject may sue here in the Kings Bench for a lesser sum than 40 s. as if 10 s. Costs be given in any Suit here, Suit to such Costs lyeth here in this Court.

Mich.

Mich., O. and 31. Eliz. In the Kings Bench.

CCCCXLV. Pigot and Harringtons Case.

Pigot brought a Writ of Error upon a Fine levied by him within age, the Case was, that the Husband and Wife were Tenants for life, the Remainder to the Infant in Fee, and they three levied a fine, and the Infant only brought the Writ of Error. It was objected by Tanfield, that they all three ought to join in this writ, and the Husband and Wife ought to be summoned and sevored, Atkinson contrary, for her the Husband and Wife have not any cause of action, but the Infant only is grieved by the fine, 35 H. 6. 19, 20, 21, &c. In conspiracy against many, it was found for the Plaintiff, and one of the Defendants brought Attaint, and assigned the false oath in omnibus quæ dixerunt, but afterwards abridged the assignment of the false oath, as to the damages, and so the attaint well lies. Two men are Joint-tenants, they take Husbands, the Husbands and their Wives make a Feoffment in Fee, the Husbands die, the Wives shall have severall Cui in vita's, for the coverture of the one was not the coverture of the other, 7 H. 4. 113. In Appeal against four, they were outlawen, and two of them brought Error upon it, and good, 29 E. 3. 14. In Action against three Coparceners, they plead by Bailiff, nul tenent de Franktenement, &c. and found that two of them were disseisors and Tenants, and that the third had nothing, and afterward the three coparceners brought attaint, and after appearance, the third sister, who was acquit, was nonsuit, and afterwards by award the Writ did abate, Tanfield. Although that the cause be severall, yet the erroneous act was joyned, and the reciting of the fine, and that Record being entice, ought to be pursued accordingly, and then the Husband and Wife shall be summoned and sevored, and it is not like to the case of 29 E. 3. cited before, for there the third coparcener had not any cause of attaint, for no verdict passed against her, Wray. As the Error is here assigned, the Writ is well brought, for the Error is not assigned in the Record, but without it in the person of the Infant, and that is the cause of the Action by him and for no other. Two Infants levy a Fine, although they join in Error, yet they ought to assign Errors severally, and they may sue severall Writs of Error, and afterwards it was holden by the Court that the Writ was good, and the fine reversed as to the Infant only.

Attaint.

Fine upon an
Infant rever-
sed.

Mich. 30. and 31. Eliz. In the Kings Bench.

CCCCXLVI. Scovell and Cavells Case.

In Ejectione firmæ by Scovell against Cavel, the Declaration was general upon a Lease made by William Pain, and it was found by speciall verdit, That William Leversedge was seised of the Land, &c. and leased the Land, same to Stephen Cavel, John Cavel, and William Pain, habend. to them for their lives and for the life of the survivor of them; Prohibited alwayes, and it was covenanted, granted and agreed betwixt the parties, that the said John Cavel, and William Pain, should not take any benefit, profit or commodity of the Land, during the life of Stephen Cavel, and further that the said William Pain should not take any benefit, &c. during the life of John Cavel, &c. Stephen Cavel, died, John Cavel entered, and afterwards William Pain entered, and made the Lease to the Plaintiff, upon whom the Defendant entered; and if the Entry of William Pain were lawfull was the Question,

Gawdy Serjeant, his Entry is not lawfull. It will be agreed, That if a man lease to three for their lives, they are Joint-tenants, but if by the habendum the estate be limited to them by way of Remainder, the joint estate in the Premises is gone, and the Land demised shall go in Remainder, and I agree, that in Deeds Pall, the words shall be taken strong against the grantor, contrary in the Case of Indentures, the words there shall be taken according to the intent of the parties, for there the words are the words of both: See Browning and Beltons Case 2. and 3. M. Ploid. 132. where by Indenture the Lessee covenanted to render and pay for the Land Leased such a Rent, the same is a good reservation, although it be not by apt words, and here in our Case, this Proviso and Covenant, Grant and Agreement doth amount to such a limitation by way of Remainder, especially when such a clause followeth immediately after the Habendum, Coke contrary; The Office of the Habendum is to limit and explain the estate contained in the premises, and here the Habendum hath done its office, and made it a joint estate, and therefore the Clause afterward comes too late, and in truth is repugnant & utterly void, as to such pur pose, but perhaps an action of Covenant lies upon it, Wray. It hath been by me adjudged if a Lease be made to three Habendum successive, the same is a void word, and the Lessees are joint-tenants, contrary of Cophold by reason of Custome, and here the proviso and the clause following, is contrary to the Habendum, and repugnant, and is void, as to the dividing of the estate by way of Remainder, which Gaudy Justice granted, Heale Serjeant, this case hath been adjudged, 16. Eliz. A Lease to three Habendum to the use of the first for life, and after to the use of the second for life, and after to the use of the third for life, the same is good, Clench Justice, this proviso follows the Habendum, and is a sentence to explain the sentence, Wray, & sic ut, it is another sentence, although it immediately follows the Habendum, Clench, if the words had been provided, that although it be limited, (ut supra) in the Habendum, scil. the first names shall have the lands to himself for life, &c. it had been good by way of Remainder, Wray, our case at Bar, is not that any person shall take the Remainder, but that any of them shall not take the p'ship during the life of the other. Tansfield took exception to the verdict, because the life of Paul is not found in the verdict, Coke, this is a verdict and no pleading, and the opinion of the Court was, that the verdict was good, notwithstanding the said Exception, and afterwards Judgement was given for the plaintiff.

Mich 30 and 31 Eliz. In the Kings Bench.

CCCCXLVII. Hudson and Leighs Case.

Appeal of Ma-
heim.

Damages.

Robert Hudson brought an appeal of Mayhem against Robert Leigh for maiming his right hand, and for cutting of his veins and sinews, which by that means are become dry, so as thereby he hath lost the use of his fingers. To which the Defendant pleaded, that heretofore the plaintiff had brought against him an Action of Assault and Batterie, and wounding, and therein had Judgement to recover, and Execution was sued forth by writ facias, and satisfaction acknowledged upon Record, of 100 Marks allowed by the Jury for the damages, and 21 l. 10 s. de incremento by the Court, with averment of all identities, Cooper Serjeant, the same is a good Bar, and although that an Appeal, and an Action of Trespass are diverse Actions in nature, and in many circumstances, yet as to the recovery of Damages, the one shall bind the other. See 38 E.3. 17. a good case. In Trespass for breaking of his Close and Batterie, the Defendant pleaded, that before that the plaintiff by Bill in the Parkhalley had recovered his Damages for the

same Trespass, &c. and boughed the Record, and the Record was sent, the which was varying from the Record pleaded, for the Record boughed, was only of Batterie without any thing of breaking of the Close: and also the Batterie is tared at another day, &c. and with averment, yet as to the Batterie it was holden good enough with averment, and as to the breaking of the Close the Plaintiff had Judgement. See 41 E. 3. brev. 548. 12 R. 2. Corone 110. and the Case betwixt Rider Plaintiff and Cobham Defendant, Pasch. 19 Eliz. Rot. 74. it was clearly holden and adjudged, that after a Recovery in Trespass, an appeal of Mayhem doth not lie, and the book which deceives the Plaintiff is 22 E. 3. 82. where it is said by Thorpe, That notwithstanding Recoverie in Appeal of Maheim, yet he may after recover in Trespass, but Non dicat e contra, Popham contrary, the Plea in Bar is not good, for the Averment is, that the stroke and the wounding supposed in the Writ of Trespass, and in his Appeal of Maheim are all one, but it is not averred that any damages were given for the Maheim, or that the Maheim was given in Evidence, for it might be, that there was not any Maheim when the Trespass was brought, but that after by the drying of the wound it became a Maheim, and then the action did rise, as if a man upon a Contract promiseth to pay me 10 l. at Michaelmas, and other 10 l. at Christmas, if he doth not pay the 10 l. at Michaelmas, I may have an Action upon the promise for the not payment of that 10 l. and afterwards I may have another Action and recover damages for the not payment of the 10 l. at Christmas, but if I do not begin any action before Christmas, I cannot recover damages but once for the whole promise and damages shall be given in Evidence, and if I be disseised, I may recover damages for the first Entry, and notwithstanding that I shall have an Assise, and if I do reenter, I shall have Trespass and recover damages for the mean profits, and the damages recovered for the first Entry shall be recompensed, and the book cited before Fitz. Corone 110. doth not make for the Defendant, but rather for the Plaintiff, for there it is averred, that the Maheim was given in Evidence, in the Action of Trespass, which it is not in our Cas, Egerton Sollicitor, we have shewed, That succidio venarum, in this appeal specified is eadem succidio & vulneratio mentioned in the Trespass, Coke, Although the identity of the wounding and cutting of the veins are averred, yet it is not averred, that the damages recovered in the Trespass were given for this Maheim, Wray chief Justice, The Jurores are to take consideration of the wound in an action of Trespass, and to give damages according to the hurt, and we ought to think that they have done accordingly, and if they have not so done, the party may pay that the Court by inspection would adjudge upon it, and so increase the damages: But now when the Jury hath given great damages, scil. 100 Marks, with which the party hath been contented it should be paid to give the plaintiff another Action, and if there be any such speciall matter, that it was not become a Maheim at the time of the Action of Trespass brought, but it is become a Maheim of later time by drying, the plaintiff ought to have shewed the same to the Court, and so have helped himself, for otherwise it shall not be so intended, but that the averment made by the Defendant, is good enough to oust the Plaintiff of this Action, and the Judgment cited 19 Eliz. before was given by me, after I was constituted chief Justice, and this Bar as I conceive was drawn out of the pleading in 19 Eliz. and afterward Judgement was given against the plaintiff.

Mich. 30 & 31 Eliz. In the Kings Bench.

CCCCXLVIII. Croftman and Reades Case.

The Case was, that I S made his wife his Executrix and dyed, I D being then indebted to the Testator in forty pounds upon a simple Contract, the Wife Executrix took to Husband the said I D, I D made his Executrix and dyed, a Creditor of I S brought an Action of Debt against the Wife Executrix of I S, and upon the pleading, the matter in question was, If by the intermarriage of the wife with the Debtor of the Testator, the same was a Devastavit or not: And if the said Debt of forty pounds due by I D should be Assets in her hands: And per Curiam, It is no Devastavit, nor Assets, as is supposed: For the woman may have an Action against the Creditor of I D: And it was agreed by the Court, that if a man makes his Debtor and a stranger his Executrix, and the Debtor dyeth, the surviving Executrix may have an Action of debt against the Executrix of the Debtor; and so it was adjudged in the principall case.

intermarriage
Debt by Exec-
utors.

Mich. 31 & 32 Eliz. In the Kings Bench.

CCCCXLIX. Woollman and Fies Case.

In an Action upon the Case upon Assumpsit that the Plaintiff shoulde enjoy such Lands for so many yeares: The Defendant pleaded the Statute of 13 & 14 Eliz. because the Land is the Glebe Land of such a Parsonage, and in truth the Defendant did mis-recite the Statute: For the Statute is, No Lease after the fifteenth day of May: And (the pleading is hereafter to be made) Secondly, the Statute is of any Benefice with cure (the pleading is of any Benefice:) Thirdly, The Statute is, without absence above eighty, and the pleading is (without absence by the space of eighty) dayes: And for these Causes the Plaintiff had Judgment.

Assumpsit:

Trin. 31 Eliz. In the Kings Bench.

CCCL. Frond and Batts Case.

Debt.

Payment to
the wife not
good.

In debt upon a Bond upon condition to stand to the Award of I S; The Defendant pleaded, That the said I S had Arbitrated, that the Defendant should pay to the Plaintiff ten pounds, and he said he had paid it to the Plaintiff's wife who received it, upon which the Plaintiff did demur: And Judgment was given for the Plaintiff.

CCCCLI. Trin. 31. Eliz. in the Kings Bench.

Grants of the
King of the
Office of Mar-
shall of the
Kings Bench.

The Queen granted to George Earle of Shrewsbury, An: 15. of her reign, the office of Earle Marshall of England, and now came the said Earle and prayed, that I S one of his Servants, to whom he had granted the office of Marshall, of the Kings Bench might be to it, because the same is an office incident to his office, and in his power to grant, and that Knowles, to whom the Queen had granted the said office of Marshall of the Kings Bench by the Attainder of North, be removed: And a President was shewed, 14 & 15 Eliz. Betwixt Gawdy and Verney, where it was agreed, That the said

said office was a severall office from the said great office, and not incident to it; And as to the Case of 39 H. 6. 33, 34. the truth is, the said office of Marshall of the Kings Bench was granted expressly by the Duke by express words, and so he had it not as incident to his office of Marshall of England: On the other side, there were three Presidents shewed, first in the time of E. 2. That the office of the Marshall of the Kings Bench was appendant to the said office of Marshall of England: Secondly, 8 R. 2. When the said great office was in the King, he granted the said office of Marshall of the Kings Bench: But 10 R. 2. both offices were rejoyned as they were before in ancient time, and there were also shewed Letters Patents of 4 E. 4. and 19 H. 8. by which it appeared, That the said inferior office had time out of mind been part of the great office; And it was moved, That when the said great office is in the Kings hands, and the King grants the said under office, if now this office be not severed from the great office for ever: Wray, It is no severance, for the chief office is an office of Dignity, which may remaine in the King, but this under office is an office of necessity, and the King himselfe cannot execute it, by which of necessity he ought to grant it. Another matter was moved, If the Grant of the King unto the Earle of Shrewsbury were good, because in it the Grant to Verney of the said under office, is not recited according to the Statute of 6 H. 8. 9. As 26 E. 3. 60. The King seizes of the Honoz of Pickring, to which a Forrest was appendant, the Baylwick of which Forrest he granted to see rendering rent, and afterwards he granted the Honoz with Appurtenances, and afterwards the Bayliff committed a Forfeiture, and that was found in Eyre, the Chancery of the Honoz shall seize it, yet the King shall have the Rent: And here the Earle of Shrewsbury shall have this office in his power to grant; And so much the rather because it was granted but for life.

Trin. 31 Eliz. In the Kings Bench.

CCCCLII. Michill and Hores Case.

Michil did affirme a Plaintiff in the Court of the City of Exeter against Hore for twenty pounds, and upon Nihil returned, it was surmised, That Trosse had certaine monies in his hands due to Hore, and according to the custome of Exeter the said monies were attached in the hands of Trosse, who appeared upon the Attachment, and pleaded, That he owed nothing to Hore, upon which there was a Demurrer, and Judgment given against Trosse because that Trosse ought to have pleaded, not only that he owed him nothing, but further that he had not any goods of Hores in his hands: And thereupon Trosse brought a writ of Error, and assigned the Error in the principall matter, upon which it was demurred, and Judgment given against the Plaintiff, because that the Plea of Trosse (that he owed him nothing) is good enough, for if there be not a Debt, it is not attachable upon such Attachment: And it is a good Plea to a common intent, and altogether in use in London, where such custome is: Another Error was assigned, for that Michill had recovered costs against Trosse, where it ought not to be: And also Judgment is not given, that Trosse should be discharged against Hore; And afterwards, the Judgment given in Exeter was reversed.

Error.

Mich.

Pleas.

Mich, 20 & 31 Eliz. In the common

CCCCIII. Dennis and Saint Johns Case.

Debt.

In a Debt upon an Obligation, against Oliver, Saint John, and Alice his wife, as heire of her Father : The Defendants pleaded, Non est factum, of the Father : And it was found by speciall Verdit, That the Obligation was made by the Father of the wife to the Plaintiff, whereas in truth, The Plaintiff hath declared upon an Obligation made to himselfe only without speaking of any other joyned Oblige, and that the Plaintiff as Surevisor hath brought the Action, and is upon the matter it shall be said the Deed of the Defendant in manner as the Plaintiff hath declared, the Jury refer unto the Court : And the case, 14 E. 4. 1. b. If three enfeoff me, and I plead, That two did enfeoff me and the same be traversed, it shall be found against me, for the Feoffment is a joyned act by them all : But if a man enfeoffeth me and two others, and they dye, so as I have all by Surevisor, in pleading I may shew the Feoffment was made to me alone : See 46 E. 3. 17. a. Three joyned tenants in Fee make a Lease for life, and afterwards two of the joyned tenants release to the third, who brings an Action of Waste against the Lessee, and the waste was, That he held of his lease only, and the waste was awarne good . Walmesley, This Plea, Non est factum, upon this matter is no good Plea, for he hath not pleaded it Respective as to the Obligation, but generally, Non est factum suum, which refers to the Oblige, only, and the issue is not whether he made the Deed to the Plaintiff or not, but generally whether he made it at all : For there is a difference, Nihil debet, for that refers to the Plaintiff, and where he pleads Non est factum : Which Shuckworth granted : See 1 Eliz. Dyer, 167. Tawes Case, this Plea Non est factum, hath not any respect to the Oblige, for if the Oblige be a Sonke, and be another person who bears the name of the Oblige, yet in those Cases, the Obligo cannot safely plead Non est factum, but where one is sued who bears the name of the Obligo, there Non est factum is a good Plea : And see 10 Eliz. Dyer, 279. W S was bound in an Obligation to one H by the name of L S, and upon that Obligation an action was brought against him by the name of W S, and he pleaded Non est factum, and the speciall matter was found, and it was ruled, that upon that Verdit the Plaintiff should not recover, but the best way for the Plaintiff was, to sue the Defendant by the name by which he is bound, and then if he appeare and plead (ut supra) he shall be concluded by the Obligation : And the Court was clear of opinion, That the Plaintiff ought to have declared upon the speciall matter.

Hil, 31 Eliz. Rot. 1428. In the common Pleas.

CCCCIV. Willis and Whitewoods Case.

Leases.

Surrenders.

The case was, That A has seised of certain Lands holden in Socage, and leased the same to L S for many years, and dyer, his heire within the age of fourteen years, the wife of A being Guardian in Socage leased the same Land by Indenture to the same L S for years, if the first Lease was surrendered, or determined was the Question : Anderson, Surrendred it cannot be, for the Guardian hath not any Reversion capable of a Surrender, but only an Authority given to her by the Law to take the profits to the use of the heire : But yet perhaps it is determined by consequence and operation of Law : As if A lease to B for one hundred years, and afterwards granted the

the Reversion to C for two years, who leaseth to B for two years, who accepts the Lease, the same is not any Surrender, for a terme of one hundred years cannot be drawned in a Reversion for two years, yet the first Lease is determined, which Periam granted: And by Windham, If a Lease be made to begin at Michaelmas, and before that time, the Lessor makes a new Lease to the same Lessee to begin presently, the same is not any Surrender, and yet thereby the first Lease is determined, and so in the principall case, which Anderson granted, but Periam doubted of it, and he said, Guardian in Hocage hath such an estate in the Reversion that he may enter for a Condition broken: Anderson, The same is not in respect of any estate that he hath, but in the name and right of the heir, and not by reason of any Reversion.

Trin. 31. Eliz. In the common Pleas.

CCCCLV. Norwood and Dennis Case.

In a Quare Impedit by Norwood against Dennis, the Issue was, If the Abbowlan was appendant to the Manor of D, or in gosse, and the Jury found that it was appendant, and further found, that the Queen had right, and title to present, for shee had presented at the two last Avoydances, Anderson and Periam Justices, If it appeareth unto the Court upon the pleading, that the King hath title to present, The Court shall award a Writ to the Bishop for the King, but here appeareth no title for the Queen upon the pleading, but only upon the Verdict, so as the one part or the other may answer to it: And because the Jury have found for the Plaintiff, the title found for the Queen shall not be respected, but as a mere Augmentation and Surplusage, for the same was out of their Issue, and their Charge, and it is no more then if one comes into the Court, and informes us of any title for the Queen, where the Court ought not to regard it.

Trin. 31 Eliz. In the common Pleas.

CCCCLVI. Green and the Hundred of Buckle-churches Case.

In an action upon the Statute of Huy and Cry, the Case was, That Green did deliver a certain summe of money to a Carrier, who put the same (amongst other things) in his Cart, and sent a boy of the age of twelve years with the Cart before, and he himselfe stayed a shourt time in the Inne, and afterwards went his way, and before he could get to the Cart the Cart was robbed and the money carried away: The boy made Huy and Cry, and came unto a Justice of Peace, and prayed that he would examine him, but he would not, but the Carrier himselfe would not goe to be examined, wherefore Green himselfe went to a Justice of Peace to be examined, and so was, and afterwards brought this Action: And it was holden by the Court, that here the Plaintiff had failed of his Action for want of sufficient examination, for the Servant who was robbed ought to be examined, and the examination of the Master or Owner of the goods who was not present at the Robbery is not to any purpose to enable the Plaintiff to this Action, for the party robbed ought to be examined: And it was said by some, That where an action doth not lye upon the new Statute of 27 Eliz. the party may have an action upon the old Statute, but others were against it, for the Statute of 27 Eliz. is in its Negative, so as if the Action doth not lye upon it, no Action lyeth at all: And it was moved by Periam and Anderson, That the Plaintiff might have an Action upon his Case framed upon the said Statute of 27 Eliz. against the Justice of Peace who refused to examine the boy; But Windham doubted of

Action upon
the Statute of
Huy and Cry.

it, because the Justice of Peace is a Judge of Record, and for such thing as he doth as Judge, no Action lyeth: To which it was answered by Periam and Anderson, That the Examination in such case is not made by him as Judge or Justice of Peace, but as a Minister appointed for the examination by the Statute, &c.

Trin. 31 Eliz. In the common Pleas.

CCCCLVII. Stevinsons Case.

Debt.

In Debt upon a Bond, the Condition was, That whereas the Plaintiff had covenanted with the Defendant, that it should be lawfull for the Defendant to cut down wood for fire-wood and hedge-wood without making any waste, or cutting more then necessary: And the Plaintiff assigned the breach in that Covenant (which is in truth the Covenant of the Plaintiff) that the Defendant had committed waste in felling wood, &c. And the Condition was to performe all Covenants and Agreements: And Exception was taken because that the Condition ought to extend but unto Covenants to be performed on the part of the Lessee, but the Exception was not allowed, so it is the Agreement of the Lessor although it be the Covenant of the Lessor the Plaintiff.

Trin. 31 Eliz. In the Kings Bench.

CCCCLVIII. Foster and Wilson against Mapes.

Covenant.

Foster and Wilson brought an action of Covenant against Mapes, and declared, That by certaine Indentures of Articles, it was agreed betweene the Plaintiff and the Defendant, whereof one part was sealed with the seale of the Defendant, and the other with the seales of th: Plaintiffs, that whereas the Defendant had leased to the Plaintiffs the Parsonage of B, he covenanted, That he would keep the Plaintiffs harmless concerning the same against one N B: And declared further, That the said N B had entred upon them; And that at the time of the making of the Indentures, he was Parson of B, i. The Defendant had pleaded Non est factum, and it was found by speciall Verdict, That the Defendant sealed one part of the Indentures, and that one of the Plaintiffs only sealed the other part: Exception was taken to the Declaration because there is not set forth in it any sufficient breach, so when the Defendant Covenants to save the Plaintiffs harmlesse against B, the same is to be intended of a lawfull Eviction: As in Puttenham's Case, 13 Eliz. Dyer, 306. But if the Covenant had been, That the Lessor should peaceably enjoy the Term, sine ejectione & interrupcione alicuius persona, upon an unlawfull entry of a wrong doer, an action lyeth: See 16 Eliz. Dyer, 328. And here the finding of N B to be Parson at the time is to no purpose: And there is not layed any expresse title in N B, but only by implication, so it might be that the Parson had leased to the Defendant renouncing Rent with clause of re-entry, and the Parson had entred for the Condition broken, and that the Plaintiffs ought to have shewed, and not generally, that he had entred, and that he was Parson: Also it is layed, That N B was Parson at the time of the Entry, but it is not shewed, what Entry, which may be taken, that he was Parson at the time the Plaintiffs entred by virtue of their Lease, and not when the said N B entred upon the Plaintiffs: Mo the Plaintiffs have not declared, That they had entred by force of the Lease aforesaid,

abovesaid, and if not, then they cannot be ejected, &c. and then no breach of Covenant, Padsey contrary, We have declared, that the Personage was delivered to us, and that NB being Parson hath entered, and the Record was read. i. That where the Defendant had demised to the Plaintiffs the Parsonage of B. It was agreed, That the Defendant alwayes shoulde keep harmlesse the Plaintiffs and the Premises against NB soz and concerning omnibus pertinentiis, &c. Tanfield, The breach is well laid, and the words of the Covenants amount to as much, as if he had said, that he would keep them from all interruption, and the difference is, when the Covenant is generall, i. keep harmlesse, &c. the same doth not extend but to a lawfull interruption, but when it is speciall against such an one, there it extends to any interruption whatsoever, Gaudy Justice conceiveth, That the breach of Covenant is well laid, i. that NB hath entered upon them, and removed them, and be it by wrong or by Right, the same is a breach, soz he hath not kept harmlesse the plaintiffs for the premises and profits of them, against NB 2 E. 4. 15. a Bond was endorsed upon condition, That the Obligoz shoulde defend to the Obligee soz such a time, such Land whereof he had before entreated him, It was holden, That if a stranger entreteth the Obligee, without any Title, the Bond is forfeited by reason of the word (defend) and although the Plaintiffs have not laid in their Declaration, that they have entered, the same is not materiall; soz it is not the point of the action, but the Entry of NB is the cause of the Action, Fennor Justice conceiveth, That the difference not at the Bar betwixt Generall Covenant and speciall, is good Law, and that in case of such a speciall Covenant interruption without Title gives an Action: but he conceiveth, that because it is not alledged that the plaintiffs had entered, that there was no breach of Covenant, See 9 Eliz. Dyer 257. Wray, The words of the Covenant do amount to peaceable enjoying during the Term, and so to an interruption without Title, Fennor 18 E. 4. 17. A is bound to B to save B harmlesse from an Obligation made by the Plaintiff to one R, if R affirme a plaint of Debt against the said Plaintiff upon the said Bond, the Bond of A is forfeit, but here the Plaintiffs cannot be harmed, soz they have not entered, Gaudy, The conclusion of the Declaration is, That NB entered upon the profits and removed them, so as they could not take the profits thereof, so it is implied, that the Plaintiffs had entered, and afterwards Judgement was given soz the Plaintiff

Trin. 31 Eliz. In the Kings Bench.

CCCCLIX. Marshes Case.

M^r Arsh, Executor of one Nicholson, brought a writ of Error to reverse Error by Ex-
- man Outlawrie in Felony had against his Testator, the Error assigned was plain, but it was moved, that this writ of Error would not lie; Gau-
- dy, The action will well lie, for by this suit the plaintiff intends to reverse, and so undo the Outlawry, for which cause this matter ought not to be ob-
- jected against him, for the Executor may have this action as well as the Heire, Fennor Justice, Where the principall reverseth the Attainder, the same shall extend to the accessory. In assise against Tenant and disseisor, each of them may have a writ of Error, and the reversal by the one shall make void the Record as to both, and he needs not any Garnishment, for by Intendment the King is to have all his goods, and the King is always pre-
- sumed present in this court, quod tota curia concessit, and therfore there needs not any Garnishment by Scire facias, but Wray said, we use in such cases to call the Attorney General of the King to know if he can say any thing wherfore the Outlawry shoulde not be reversed. The Error assigned was

was, That the Erigent issued forth into London, and the Sheriffe returned that he had proclaimed the party cōt. in cōt. quousque, &c. Where he ought to say de Hustingo in Hustingum and that was holden by the court clearly to be Errōz, and afterwards at another day it was moved by Coke, That a man attainted of Felony could not make Executozs, for he is dead in Law, and as Bracton saith, solus Deus facit Heredes & homo nominat Executores, and therefore the Heir onely shall have a Writ of Errōz: also an Executoz cannot have a Writ of Errōz, but onely upon a Judgement given in a personal action, but this Attainder is a thing of a higher nature: as where a woman poysoneth her Husband, the Heir shall not have an Appeal, for Murder is changed into Treason, and that offence is a thing of a higher nature; so this attainder is of a higher nature then in the personality. Also it may be mischievous to the Heir, for the Executoz may shortly byng and pursue his Writ of Errōz, by which the Judgement shall be affirmed, and so the Right of the Heir shall be bound, also when Errōz is brought to reverse and outlawry of Felony, a scire facias ought to be sued against the Lords immediate and immediate, which cannot be here at the suit of the Executozs: also it was found by Enquest of the Coroner, that the Testator solum fecit, so that thereby if he had been acquitted, he shall lose his goods, and then the Executozs have not any reason to byng this Writ of Errōz, but see 11 H.4. Error 51. That Executozs shall have a Writ of Errōz of an Outlawrie pronounced against their Testator, and if it be reversed they shall have restitution of the goods of the Testator, but it doth not appear ther's that it was upon an Indictment of Felonie, Alcham, As well the Executoz as the Heir is a person able for to sue a Writ of Errōz in such case, as 13 E.4. where a false oath is given against one in assise and dieh, the Heir shall have an attaint for the Land, and the Executoz in respect of the damages, Popham Attorney Generall, This Outlawrie is a reall Judgement, therefore the Executoz cannot have errōz upon it, Wray, It is good That this case be considered, for it may be mischievous, for thereby the Executoz shall avoid the attainer against the King, and the Lords, Fener, That cannot be without a scire facias, Gawdy, The Executozs shall have this action, and as to that which hath been objected, that the party attainted cannot make Executozs, the same is no reason for the Executozs do pretend, that their Testator was not lawfully outlawred, and so by this Suit, they do endeavour to take away that disability, and therefore it ought not to be objected against the Executoz, and if the Case here be, That the Testator had not lands, but only goods, there is no reason, but that the Executozs should have a Writ of Errōz, otherwise the goods of the Testator should be lost, and it was clearly holden by Wray chiel Justice, That the Executoz might have and pursue this Writ of Errōz, He Outlawrie of the Testator notwithstanding; and afterwards the Outlawry was reversed accordingly.

Trin. 31 Eliz. In the Kings Bench.

CCCCLX. Trussells Case.

Habeas corpus Russel was removed out of the Counter of London by Habeas corpus into the Kings Bench: Egerton, The Queens Sollicitor moved the Court, that Trussell was a person attainted of felony, & so had not any lands or goods, to satisfie, &c. and also his life was not his own, and upon the Return of the Habeas corpus, it appears that Trussell was detained in prison for an execution, and for divers actions, and it was the opinion of the Court, That as to the Execution he ought not to be discharged, for then the party should lose his Debt for ever: but as to the other actions, it was the opinion of all the Justices,

Uices, that Trussel ought to be discharged of them; for a man so attainted ought not to be put to answer, nor taken in Execution, and so are all our books, and they said that they had conferred with the Justices of the Common Pleas, and with the Barons of the Exchequer, which were of a contrary opinion in this case upon the very matter, and not upon the manner of the pleading, but yet we will discharge our consciences as we have done, for there is not any book against us, Egerton stetit super seminas antiquas, and at last it was awarded, That Trussel should be discharged of all actions brought against him.

Trin. 31 Eliz. In the Kings Bench.

CCCCXL. Sovers Case.

Over and others were indicted upon the Statute of 8 H.6. of forcible Entry, because they had expulsed one A out of his Land, and disseised the upon Statute 8 H.6.
Sporoz and Commonalty of London, who were in Reversion, and the same being removed hither, reparation was prayed thereupon, and White for the City, who was in Reversion, and the Lessor prayed that no Restitution might be, for they had let the house to another, and that he who had procured this Indictment claimed in by a Custome of London, That the Executor of the last Termor should not be put out, if he shall give as much for it as any other will, whereas in truth there is not any such Custome, and for that cause the Restitution was stayed, and it was said by the Court, that Restitution shall be always made to him in the Reversion, and not to the Lessor for years, for he who is disseised shall be restored, and then the Lessor may re-enter,

Trin. 31 Eliz. In the Kings Bench.

CCCCLXII. Beal and Carters Case.

In an action of false imprisonment, the Defendant justified because the Plaintiff brought a child of the age of six years, and not above, into the Parish Church of W. & eundem ibidem relinquere voluerat, & intendis-
set, without keeping, or nourishment, to the danger and destruction of the child, & contra pacem, for which the Defendant being Constable of the said Parish arrested the Plaintiff and put him in prison until he did agree and promise to carry the child from whence it came, upon which the Plaintiff did remonstrare in Law: It was moved, that the Justification was good, for every subject might do it, a constable, and if in this case the child, being so exposed, should be famished, for want of nourishment, it had been murder as it was holden at Winchester before the Lord chiefe Baron, 20 Eliz. Another Exception was taken to the Plea, because he saith (quendam infan-
tem) without naming him, and he ought to say, Quendam infanteum ignocum, but that Exception was not allowed; another Exception (ibidem relinquere intendit) but he doth not say, that he did depart from it, and then his meaning is not traversable, or issuable, or to be tried by Jura, See 22 L.4.43. Gaudy Justice, It was a great offence in the Plaintiff, but the same ought to be punished according to Law, but the Constable cannot imprison a subject at his pleasure, but according to Law, i. to stay him and bring him before a Justice of the Peace to be there examined, Wray, If the Defendant had pleaded that he stayed the Plaintiff upon that matter, to have brought him before a Justice of Peace, it had been a good Plea, Fennor, The Justifica-

justification had been good, if the Defendant had pleaded, that the Plaintiff refused to carry away the child, so all the Justices were of opinion against the Plea, but they would not give Judgement by reason of the ill example, bat they left the parties to compound the matter.

Pascb. 33 Eliz. In the Kings Bench.

CCCCXIII. Cole and Wall's Case.

*Ejectione Cu-
todia lieth not
upon a Copy-
hold estate.*

In an Ejectione Custodiz, the Plaintiff declared, that A was seised of the Manors of D within which Manors are diverse Copyholds of inheritance, and that the Custome of the Manors is, that if any Copyholder of inheritance of the said Manors dieth, his heir within the age of 14 years, that then the Lord of the Manors might grant the custodie of his body and Lands to whom he pleased, and shewed, that one Clerke a Copyholder of inheritance of the said Manors died, his son and heir within the age of 14 years, upon which the Lord of the Manors committed the custodie of his body and Lands to the Plaintiff, and the Defendant did eject him, and upon no guilty, it was found for the Plaintiff; It was moved in arrest of Judgment, That this Action would not lie upon a Copyhold estate; Quod non Curia concessit, and yet it was said, that an Ejectione firmæ lieth upon a demise of Copyhold Land, by Lease of the Copyholder himself, but not upon a demise by the Lord of the Copyhold; Quod sive coacestum, and afterwards the Case was made on the Plaintiff's side, and it was said, that this was but an action upon the Case, in the nature of an Ejectione firmæ, and this interest is not granted by Copy, but entered only into the Court Roll; so it is not an interest by Copy, but by the Common Law, for the words are, Quod Dominus commisit custodiam, &c. and both not say in in Curia and afterwards Judgement was given for the Plaintiff.

Trin. 33 Eliz. In the Kings Bench.

CCCCXIV. Bond and Bailes Case.

Judgement
upon a Bond
where satisfied
before a Sta-
tute.

Bond brought a Scire facias against Bailes administrator, of one T Bp Bon a Recovery had against the Testate, in action of Debt, the Defendant pleaded, That before the said Judgement given, the Testator did acknowledge a Statute Staple to one C. and that the Son was not paid in the life of the Testator nor after, and that they have not in their hands any goods of the Testate beyond what will satisfie the said Statute, upon which there was a demurrer in Law, and Crook argued, That the Bar is not good, for here is not pleaded any Execution upon the Statute, and then the Judgement, the Statute being things of as high nature, that of which Execution is sued, shall be first sued, and if this action had been brought upon a Bond, the Plea had not been good: for although that Brian saith, 21 E. 4. That Recognizances shall be paid by Executors before Bonds, yet that is to be intended, when a Scire facias is to be sued upon it, otherwise not: And 4 H. 6. 8. in a scire facias upon a Judgement, fulfilled ministered in the day of the writ brought is a good plea, by which it appears, That the Executors shall pay the Debt upon the Obligation before the writ brought, it had been good, See 22 E. 3. Executors 73. In a scire facias upon a Judgement in Debt given against the Testator, Enquiry shall be what goods the Executors had the day of the scire facias: and he said, it was noted by Anderson, 20 Eliz. in this Court, In Debt upon a Bond against Exe-

for, the Defendant pleaded, that the Testator was indebted by Judgement to A, and that they had not more, then to satisfy the same, and it was holden no plea, if not that he pleaded further, that a Scire facias was sued upon it: Wray said, The same is not Law, and there is a difference when the Judgement is given against the Testator himself, and where against the Executors, for where Judgements are given against Executors, the Judgement which is given before shall be first executed, but if two Judgements be given against the Testator, he who first sues Execution against the Executors shall be first satisfied, because they are things of equal nature, and before suit, it is in the Election of the Executor, which of them he will pay, See 9 E. 4. 12. As if two men have Tallies out of the Exchequer, he which first offers his Tally to the officer shall be first paid, but before that, it is in the choice of the officer, which of them shall be first satisfied, and therefore, 19 H. 6. If the Lease enrolled be lost, the Enrollment is not of any effect, and Pasch. 20 Eliz. our very case was moved in the common Pleas, in a Scire facias upon a Judgement given against the Testator, the Executor pleaded, That the Testator had acknowledged a Statute before not satisfied, ultra quicquid, and it was holden no Plea, for a Statute is but a private and pocket Record, as they called it, and 32 Eliz. betwixt Conny and Barham, the same plea was pleaded, and holden no Plea. Also if this plea should be allowed, great mischiefs would follow: for then no Debts should be satisfied by Executors, for it might be, that the Statute was made for person or man of Covenants, which Covenants perhaps shall never be broken: and afterwards Judgement is given for the plaintiff.

*Conny and
Barham's Case,*

Trin. 32 Eliz. In the Kings Bench:

CCCCXLV. Crew and Bailes Case.

A writ of Error was brought upon a judgement given in the common Error. A pleas, in a Bill of privilege brought by an Attorney of the said Court, upon an Obligation, and upon the said Judgement issued forth processe of Execution, upon which the Defendant was outlawed, and the Error was assigned in this, That upon that Judgement processe of outlawrie doth not lie, for Capias is not in the original Action, and so was the opinion of the whole Court, being upon a Bill of privilege, and the Outlawrie was reversed, and the Error was assigned in the first Judgement, because there were not fifteen dayes betwixt the teste of the Venire facias, and the return of it, but that was not allowed, for it is helped by the Statute of 18 Eliz. cap. 14.

Trin. 30 Eliz. In the Kings Bench.

CCCCXLVI. Wade and Presthalls Case.

William Wade brought an Action of Debt against Presthall, the Defendant pleaded, That he was attainted of Treason not restored, nor pardoned, and demanded Judgment if he should be put to answer, upon which the Plaintiff did denie; It was argued for the Plaintiff, that the Plea is not good, for the Defendant shall not take benefit of his own wrong: A person attainted gives his goods, he shall not avoid it; A woman takes a Hus, thereby shee hath abated her own Writ: It is true, That a person attainted is a dead man, it is so, as to himselfe, but not as to others, 33 H. 6. a person attainted is murdered, his wife shall have an appeal, so as to all respects

respects he is not dead, and although as yet the Plaintiff cannot have any Execution against the Defendant, yet here is a possibility to have Execution, if the Defendant get his pardon: As a man shall have warrantia Charta, although he be not impleaded and yet he cannot have execution, but there is a possibility to have execution, 22 E. 3. 19. A Rent granted to one in Fee upon condition, that if the Grantee dye, his heir within age, that the rent shall cease during the nonage, the Grantee dyeth his heire within age, his wife brought Dowry presently and recovered, and yet she cannot have execution, but yet there is a possibility to have execution, viz. upon the full age of the heir: Coke, contr. by his Attainder he hath lost his Goods, Lands, life, degree, soz he is now become terra filius, and he cannot draw blood from his Father, nor afford blood to his Son or his posterity, so as he hath neither Ancestoz, nor Heire, and as to the possibility, the same is very remote, for the Law doth not intend that he shall be pardoned, and see 6 H. 4. 64. A man committed a Felony, and afterwards committed another Felony, and after is attainted of one of them, he shall not be put to answer to the other, but if he obtaine his Charter of pardon, he shall answer to the other, See also, 10 H. 4. 227. t. Corona: Popham Attorney Generall: The Defendant ought to answer, for none shall have advantage of his own wrong: The Plaintiff is made a Knight pendant the Writ, it shall abate, because his own Act, but here Treasons are so heynous, that none shall have easse, benefit or discharge thereby: And if the Defendant shall not be put to answer untill he hath his pardon, then the action is now suspended, and an action personall once suspended is gon for ever, and he cited 29 E. 3. 61. in the Book of Assizes, where it is said by Shard, execution upon a Statute may be sued against a man attainted, and he said, That if the Enemy of the King comes into England, and becomes bounden to a Subject in twenty pounds, he shall be put to answer, notwithstanding that Interest that the King hath in him: Harris Serjeant to the same intent, he conceived by 33 H. 6. 1. That Traitors are to answer, for if Traitors break the Coale, the Coaler shall answer for their escape, for the Coaler hath remedy against them, contrary of the Kings Enemies, and he cited the case of one Burcher, who being attainted of Treason struck another in the Tower, in which notwithstanding his Attainder, he was put to answer: Egerton Solicitor Generall: And he said, That the Action is not suspended, but in as much as every Action is used to recover a thing detained, or to satisfy a wrong, and if it can appear that the party cannot be satisfied according to his case, he shall not proceed: And in this case, the Plaintiff, if he should obtaine, Judgement could not have execution by the common Law, for he hath no goods, nor by the Statute of Westminster, 2. by Elegit for he hath no Lands, nor by the Statute of 25 E. 3. by his body, for it is at the Kings pleasure, and then to what purpose shall the Plaintiff sue, and it is a general rule, That in all Actions, where the thing demanded cannot be had, or the person against whom the thing is demanded cannot yeild the thing, that the Writ shall abate: As in a Writ of Annunity by Grantee of an Annunity for years, the terme expireth, the Writ shall abate; Tenant in speciall tail Abatement of brings Waste, and pendant the Writ, his issue dyeth, the Writ shall abate, &c. 2 E. 4. 1. A man Out-lawed of Felony pleader in dis-affirmance of the Out-lawry, and yet he was not put to answer untill he had his pardon; and then he shall answer: And as to the case of 33 H. 6. 1. It doth not appear that the Traitors were attainted, and then there is good remedy enough: And Burchers case, cannot be resembled to our case, for although that by the Attainder the body of the party might be at the Kings pleasure, yet his body may be punished for another offence, for the example of others: And as to Tressels case, who in such case was put to answer, I grant it, for he com-

Execution against a person attainted.

Burchers case.

Regula.

Abatement of

brings Waste, and pendant the Writ, his issue dyeth, the Writ shall abate, &c. 2 E. 4. 1. A man Out-lawed of Felony pleader in dis-affirmance of the Out-lawry, and yet he was not put to answer untill he had his pardon; and then he shall answer: And as to the case of 33 H. 6. 1. It doth not appear that the Traitors were attainted, and then there is good remedy enough: And Burchers case, cannot be resembled to our case, for although that by the Attainder the body of the party might be at the Kings pleasure, yet his body may be punished for another offence, for the example of others: And as to Tressels case, who in such case was put to answer, I grant it, for he com-

In ded Judgment if Action, and so admitted him a person able to answer, and then it could not be a good Plea in Bar: And in Ognells case, the return of the Sheriff shall bind them, for upon Proces against a person attainted, they returned Capi where they ought to have returned the speciall matter without a Capi, but now this generall returne shall bind them, and by that he shall be concluded to say that the party was not in Execution: And this Plea is not any disabling of the Defendant, but he informes the Judges that he is not a person able to answer to the Plaintiff: As in a Precipe quod reddat, the party pleads Non tenur, the same is no disabling of his person, but a shewing to the Court that he cannot yeild to the party his demand: A man shall not take advantage of his own wrong, i. In the same thing in which the wrong is supposed, or against him against whom the wrong is supposed to be done, but in other cases, he shall take advantage of his own wrong, as Littleton, If a Lease for life be made, the Remainder over in Fee, and he in the Remainder entret upon Tenant for life, and disseiseth him, the same is a good seisin, upon which he may have a Writ of Right, Littleton, 112. 35 E. 3. Droit, 30. And yet this seisin was by wrong: And there was a Case betwixt Marbery and Worrall in the Exchequer, the Lessor entred upon his Lessee for life, made a Feoffment in Fees with clause of re-entry, the Lessee re-entered, the Lessor at the day came upon the Land and demanded the Rent which was not paid, it was holden the same is a good demand of the Rent, and yet he is a trespasser to the Lessee: And in another Case, A man shall take advantage of his own wrong, Fitz. N. B. 35. N. An Infant hath an Abbowson by dissent, the Church becomes void, he who hath Right paramoer usurps, and presents to the Church and the six moneths passe, now by this tortious usurpation, he is remitted, and the Infant out of possession and without remedy: And he cited the case, 16 H. 7. 10. A Scire facias out of a Fine was brought against an Abbot, by which Fine the Predecessor of the Abbot granted to find a Priest to sing Mass in such a Chappell, &c. and the Abbot pleaded, That the said Chappell was become ruinous and decayed, so as no Priest could sing Mass there, and it was prayed on the part of the Plaintiff, that for as much as the Covenant is confessed that Indemnity be given, but that Execution should cease untill the Chappell be re-built, but it was not allowed, for this is a good Bar for the time, and no Indemnity shall be given, for it shall be in vain, for it cannot be executed because there is no Chappell, and it may be the Chappell shall never be built againe: And so in the principall case, &c. It was adjoined.

Cases where a man shall take advantage of his own wrong.

Marbery and Worrall's case;

Trin. 33 Eliz. In the Kings Bench.

CCCCLXVII. Knightley and Spencers Case.

In a Prohibition betwixt Knightley and Spencer, The Case was, That Ph. Abbot of Evesham, and all his Predecessors time out of mind, &c. were seised as well of the Rectory improprieate of B in the County of N and also of the Manors of B in the same Parish, &c. untill the dissolution of his house, and that by reason thereof, the said Abbot and all the Predecessors had holden the said Manors discharged of payment of Tithes, untill the dissolution, &c. and shewed the branch of the Statute of 34 H. 8. And that the said Abbot did surrender the Possessions of the said house to the King, and that the King held the same discharged of the payment of Tithes, and that afterwards the King granted unto the ancestor of Knightley the said Manors, and to the ancestor of Spencer the said Rectory, and although the Plaintiff ought de jure to hold the said Manors discharged of Tithes; yet the Defendant sued him in the Spirituall Court, &c. To which the Defendant confessing

Prohibition.

confessing the Impropriation, pleaded, That the said Abbot was seized, &c supra, but that before the making of the said Statute of 31 H.8. the said Abbot demised Decimas Rectorie predict. to one Spencer for 70 years, who made the Defendant his Executor, and died, and that at the time of the said Demise, and dissolution of the said Abby, one Goodman and others were possessed of the said Mannor, until the year 1585. which was the year before the Suit began in the Spiritual Court, and that at the time of the dissolution he paid Elizeth for it, and now the Plaintiff refuseth to pay, &c. absque hoc. That the Abbot and his Predecessors held the said Mannor quit of the payment of Tithes time out of mind, &c. upon which the plaintiff did demur in Law, Cook, for the plaintiff. That this Unity of possession is a discharge within the Statute of 31 H.8. the words of which are, That the King and his assignes, shall have and enjoy the Lands discharged and acquited of Tithes, as freely as the said Abbot held the same at the day of the dissolution: And see before, whereas divers Abbots, were acquitted and discharged of, and for the payment of Tithes, for the Statute doth not intend a real discharge, as by composition or such manner, which is not here, but only a suspension, which is not any discharge in Law, & yet in speaking of discharge ordinarily an annual discharge is understood. As if I be bound by Obligation to discharge one of such a Bond, it is not enough to pay the mony, but I ought to precise an annual Discharge, where it is put generally, but where it is put secundum quid, as it is here referred to the Dissolution. A suspension is a Discharge intended in the said Statute, but where the Statute is indefinite, there an annual discharge is understood, but restrained to a time a suspension lasteth, and truly it is a discharge within the intent of the Statute, so if the Statute shall be intended of an absolute discharge, and a Discharge in Law only, the Statute had been superfluous, for the Law laid so much before, so without such provision, the King and his assignes held discharged from payment of Tithes, But the makers of the Statute knew well enough, That the Abbot might have such discharge by divers means, and it should be infinite for the party interested to inquire of them all, and therefore they did enact briefly, That if at the time of the dissolution they were in any manner freed of payment of Tithes, the same should be sufficient, and so here is not any wrong taking, for the Person had all as he had before, and the same is like to the Case between Wharton and Morley, 7 Eliz. in the Exchequer, the Report of which Mr. Pilkerton communicated unto me, and it was upon the Statute of 1 E. 6. cap. 14. of Monasteries. That all Grants made to the King by any Probst, Governor, &c. of any Mannor, &c. shall be good, &c. and the Case was, That a Prebend of the Church of York surrendered to the King, but the surrender was never enrolled, and yet adjudged good upon the Statute, for if it was a lawfull surrender, the same had been good of it self, without any aid of the Statute, which was made to supply insufficient assurances, and so in our Case for the Case abovesaid, and it should be injurious to abide the Jury to inquire of the manner of the Discharge, if it were by composition upon the foundation, or by dispensation of the Pope, as Cisterciers Templars: And here the plaintiff hath declared of an Impropriation before time of memory, and so before the Councille of Laterane, which was within those 400 years, and 25 Eliz. there was a Sussex Case, where the Plaintiff deposed he here, but they would not proceed, and see Dyer 10 Eliz. 277. 278. The Prior of St. John hath privilege from Rome, that he shall not pay Tithes for any Land, quas propriis manibus aut sumptibus excolunt, but their Farmers have paid Tithes, and it was holden, that in the hands of the Farmers Tithes should be paid, but after the Term ended, the Farmers should be discharged, so as the Statute hath favourable consideration upon this point: Now it is to see, if the Lease of the Recouye by which the Defendant

Unity of pos-
session a dis-
charge of
Tithes.

Wharton and
Morley's Case.

vants claim be good or not, and then admitting, that Tithes are due in this Case, yet if his Lease be void, he shall not have a consultation, especially if it appeareth upon his own shewing, as it was holden in a Hampshire Case betwixt Sutton and Dowze which see Mich. 25 and 26 Eliz. and in that case the Lease is void, for it was made within a year after the Statute of 31 H. 8. ^{Sutton and Dowze Case.}

the January before, and the Statute in April after, for he hath not averred, that the usual Kent is reserved, nor that the Land was usually let to farm, for which Leases otherwise made within the year are absolutely void by the said Statute: but it will be objected, That this matter shall come in of our part, and it is sufficient for them to plead the Case, but it is not so, as it was lately agreed in Heydons Case in the Exchequer, where the Case was, That the Garden and Canons of the Colledge of Ottery leased certain Lands to Heydon for years, and he in pleading of his Lease did not shew, that the ancient Kent was reserved, and therefore naught, and so was the opinion of the Justices of the Common Pleas, in the Case betwixt the Lord Cromwel, and All-Souls Colledge, upon the Statute of 13 Eliz. cap. 6. upon a branch of it, by which it was provided, that the third part of the Kent reserved upon any Lease, shold be paid in corn, &c. and the Leases made to the contrary should be void, and in an Ejactione Fictio, brought upon such Lease, because it was not shewed in the Declaration, that the Corn was reserved according to the Statute, Judgement was arrested, and the need not to plead the Statute, for although the Statute be particular, yet because the King hath interest in it, it shall be holden in Law a generall Ac, and the Judges shall take notice of it, although it be not alledged by the party, as it was ruled in the Lord Barkleys Case, 4 Eliz. Plow. 271. but if such Kent was reserved, yet the Lease cannot be good, for the King cannot have his Kent, because it is not incident to the Reversion, nor passeth by the Grant of the Reversion, for it is not a Kent, but rather a sum due by reason of contrag, which see 30 Eliz. 6. A man leaseth a Hundred, rendering Kent, or grants a Kent out of a Hundred, the same is not a good Kent, but merely void, for a Hundred is not manorable, nor can be put in view, nor any Allse liech of such Kent, See 9 Eliz. 24. and in 20 Eliz. in the case betwixt Cochet and Cleer, the Dean and Chapter of Norwich leased a Parsonage, and common of pasture rendering Kent, 1 E. 6. they surrendered their possessions to the King, and afterwards the King granted the Parsonage, without speaking of the common of pasture. It was holden that the patentee of the parsonage should have all the Kent, and no apportionment should be in respect of the Common, for all the Kent is cut out of the Parsonage, and nothing out of the Common: Holdine for Tithes are not an hereditament, which cannot support a Kent within this Statute, for which cause the Lease is void: Also he said, that the traverse of the Defendant was not well taken, for the Plaintiff hath said, That time out of mind, &c. the Abbot and his Predecessors were lessees of the Rectorie and Manor aforesaid, simul & semel, and ratione inde was discharged, &c. at the time of the dissolution, the Defendant traverseth *ad hoc*, that the Abbot and his Predecessors held discharged of Tithes time out of mind, &c. which is not good, for he hath traversed out conclusion, for our plea is an argument, wheresoever is unity, time out of mind, &c. there is a discharge of Tithes, but in the Abbot was such an unity, ergo he held discharged of Tithes, as 21 E. 3. 22. In a Præcipe quod reddar, the Tenant saith, that the Land in demand, is parcell of the Manor of D., which is ancient Demesne, and &c. to which the Plaintiff saith, That it is Franklee, and the same was not good, for he denieth the Conclusion, but he ought to plead to the nature of the Manors, that it is not ancient Demesne, or that the Land in demand is not parcell of it. Another matter was, whether it is pleaded, suit in tenura & occupatione of Goodman and others, but he doth not shew by what Title, disseisin of Lesse, or other Title, &c.

Buckley contrary. And he said, This unity of possession is not any discharge of Tythes by the said Statute, and as to the case cited before, of 3 H. 7. 12. where Tenant in tail of a Rent entreteth upon the Tenant of the Land, now is the Rent suspended, and then after when he makes a Feoffment in fee, by that Feoffment the Rent is extinguished which was but suspended at the time of the Feoffment, and therefore some have holden that if after such Entry, he makes a Lease for life of the Land, that his Rent or Seigniory is utterly gone in perpetuum, for by the Livery all passeth out of him, which he said can not be Law, and so it seemed to Gaudy Justice. Then upon such Feoffment with warranty he could not vouch as of Land discharged of the Rent generally, but as of Land discharged at the time of the Feoffment, with Proces that the suspension is not a discharge, for it was suspended before the Feoffment, and discharged by the Feoffment, and so suspension is not a discharge, a Fortiori in the Case of Tythes, for in the case of common, and rent, although they are suspended, so as they cannot be actually taken, yet they are to some intent in esse: As where Lands holden of other Lords are in the hands of the King for Primer seisin by reason of Prerogative, and during such seisin as the King the Lord gets seisin, the same is a good seisin notwithstanding that it was suspended, so as he could not distrain: And also in Assize of Land, damages as to the Rent out of the Land shall be recompensed, therefore the rent in some sorte is in esse, and a multo fortiori, this Tithe, which is a thing of Common Right, shall be in esse, but goes with the Land, and therefore by unity of possession shall not be suspended; 35 H. 6. he who hath liberty of Warren in the Lands of another entreteth into the Land, the Warren is not suspended, nor by Feoffment of the Land extinguished, and in this Case upon the master, during the unity of possession, the Tithes were paid, although not in specie: also the Abbot had the Tithes, as Patron of B., and the Land as Abbot, and therefore no suspension, for the Tithes were always in esse, although not taken in the manner, as Tithes commonly are, but by way of Retainer, 22 E. 4. 44. A Warre of Annuity is brought against a Prior, and it appeared, That the Prior and his Successors have used to pay the Annuity as Parson of D., and not as Prior, which Parsonage was appointed to the said Prior by time out of mind, and in the warre, the Defendant was named Prior only, and not Parson, and therefore the Warre was abated, See 14 E. 4. 10 H. 7. 5. In an Action of Warre: So Bracebridges Case, 14 Eliz. Plowd. 420. The Case put by Catinine, If the Parson, Patron and Ordinary make a Lease for years, and afterwards the Lessee becomes there Incumbent, the Term is not ended, for he hath the Term in his own Right, and the inheritance in the Right of his Church, which see 30 H. 8. Dyer 41. A Parson purchaseth, and lett leaseth his Parsonage, he himself shall pay Tithes, notwithstanding this unity, and as to the reason of the other side, That if such Discharge of Tithes be not intended by the Statute, but onely a Discharge in Law, the Statute shoulde be in vain, the same is not so, for if the Abbot haue been discharged by way of release or composition for the Monasterie being dissolved, the Appropriation had been gone, if it had not been imported by the Statute, and then the Release and composition of no sorte, and the King shoulde not take advantage of it, but by this Statute, and as to Whartons Case before cited, the same cannot be Law, for it hath been holden upon the Statute of 18 Eliz. of Confirmations, That if an Infant maketh a Lease to the King, the same is not made good by the Statute, for the said Statute extends to imperfections in circumstances, and not in substance. And although the Lease be not good, yet because the matter of the surmise is naught, although our Bar be naught, a Consultation ought to be granted, also our Lease is well pleaded, and if such defect be in it, as hath been objected, the same ought to come in by Plea on the other side, and

A Rent in
esse to some
purposes, and
suspended to
other.

it is not like Heydons Case, for there it was found by specall Verdit, nor to Cromwells Case where such defect was in the Declaration, and so no ground of Action, as to the Traverse it is good enough, as if speciall Bastardy be pleaded against one born before the marriage, and so Bastard, the other party shall traverse generally the Bastardy, and not the speciall matter, but for the principall matter, i. this unity of possession, divers rules have been. 5 Eliz. in the Common Pleas, The Case was, An Abbot had a Manor within the Parish of D, and a Composition was made betwixt the Parson of D, and the said Abbot, that the Parson should have yearly certain Loads of Wood, out of thirty Acres of the said Manor, for, and in recompence of all the Tithes of Wood there, afterwards the Parsonage was appropria-
ted to the said Abbot, and afterwards the house was dissolved, and the Man-
or granted to one, and the Rectory to another, and it was holden, That the
portion of Tithes was removed, for he had them, scil. The Manor and
the Tithes in severall Rights, and Manwood Chief Baron, and Periam Ju-
stice, to whom a Case depending in the Chancery was referred concerning
the discharge of Tithes by unity of possession, delivered their opinions,
That such an Unity is not any discharge within the said Statute: It was
adjoined.

Mich. 32 Eliz. In the Kings Bench.

CCCCLXVIII. Hoskins and Stupers Case.

In an Action upon the Case, the Plaintiff declared, That whereas the Plaintiff had sold to the Defendant 1000 couple of Newland Fishes to the use of the Defendant, and in consideration that he should ship, and should Assump-
tion byng and carry the adventure of them from Bristol, in portum of Saint
Lucar and should carry back again the value of the said Fish to London or
Bristol secundum usum Mercatorum, The Defendant did promise, that upon
the arrival of the said Fish, in portum of Saint Lucar, he would give to the Plaintiff 12 l. and said, that he arrived with the said Fish, ad portum of
Saint Lucar, and that afterwards he arrived with goods of the value of the
said Fish, ad portum of London, secundum usum Mercatorum. It was holden by all the Judges, that in portum, and ad portum is all one, as the State-
ment of ^{Exposition of} ^{words.} *Wast* is, *Quod vicecomes accedit ad locum vastatum*, yet he ought
to enter into the Land: So the *Writ* of *accedas ad Curiam*, & in plena Curia
recordari facias, &c. Another Exception was, because he declared, That
he returned with goods to the value, and doth not say, whose goods they were,
but the Exception was not allowed, for these words *secundum usum mercato-*
rum imply that they were the goods of the Defendant, *Quod suic concessum*
per Curiam, and afterwards Indgement was given for the Plaintiff.

Trin. 32 Eliz. In the Kings Bench.

CCCCLXIX. Walgrave and Agurs Case.

Sir William Walgrave brought an Action upon the Case against Agur. up-
on these words spoken by the Defendant to a servant of the Plaintiff, It Action for
is well known, that I am a true subject, but thou (invendo the said servant) scandalous
servest no true subject, and thine own conscience may accuse thee thereof. words.
It was moved in arrest of Judgement, That these words are not actionable,
for no slander comes to the Plaintiff thereby, for perhaps the Party ser-
ved no man, but the Queen, and if the words may receive such sense, which

Kinsey Case.

is no pregnant proof of insanity, they are not actionable, as in the Case before Mr Savage and Cook, These words; Thou art not the Queens friend are not actionable, for it might be they were spoken in respect of some ordinary misdemeanours, as in not payment of Subsidies, or the like: Also it is not averted, that the party to whom the words were spoken, was the Plaintiffs servant. Coke, Where a man is touched in the duty of his office, or in the course of life, an Action lieth, although that otherwise the words are not actionable, and here is set forth in the Declaration, That the Plaintiff at the time of the speaking of the said words, was a Justice of Peace, and Sheriff of Suffolk, and Captain of a Troop of 120 Horse to attend the Preservation of the Queens person: So in respect of place & dignity in the Commonwealth, as 2 H.8. The Bishop of Winchester brought an action upon the Statute of Scandal, Magnatum, upon these words, My Lord of Winchester sent for me, and imprisoned me, untill I made a Release to J.S. and in respect of his Place and Dignity the words were holden actionable: and 9 Elizabeth Dyer, In an action upon the Case by the Lord Aburgavenny against Wheeler, My Lord of Aburgavenny sent for us, and put some of us into the Coal-house, and some into the Stocks, and me into a place in his house called Little Case, and the words were holden actionable: So in our Case, Lewes said, It was the Case of one Kinsey; one said to a Bailiff of a Franchise, Thou didst execute false Warrants, without saying, they were falsified by him, adjudged an Action did not lie. Wray Chief Justice, These words in themselves are not actionable, for the Plaintiff might be untrue in small things, which gave no discredit, but the quality of the person of whom they were spoken, may add weight to them, as to call one Bankrupt generally, no action lieth upon it, but to call a Merchant so is actionable. So to call one Papist, no action lieth for it; But if one calls the Archbishop of Canterbury so, an action will lie, for he is Governoor of the Church. Thou art an untrue man to the Queen, gives not an action to an ordinary Subject, but such words spoken of one of the Privy Council, are actionable. Corrupt man, in themselves are not actionable, but being spoken of a Judge, an action lieth. It was Birchleys Case, an Attorney of this Court, Thou art a corrupt man, and dealest corruptly, and it was adjudged per Curiam, that the words were actionable, for that referres to his calling. Gaudy was of opinion, that the words were actionable of themselves, without respect had to the Quality of the person of whom they were spoken, for the words are particular enough, and to touch him in the duty of a Subject, which is to be faithfull to his naturall Prince, is a great Reproach and Slander. Fennor conceived, that the words were not actionable, VVray, as before, Of themselves they are not actionable, for they are in general, for if he be indicted of Trespass, he is not a good Subject.

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